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William V. O'Brien and Paul Ramsey are two modern just war theorists who have opposite views on the relationship between the jus in bello principle of discrimination and the international law principle of military necessity. This study analyzes these positions to determine their consistency with a Christian ethical framework and explores the possibility of a synthesis of their views. The study covers the history of the development of the principle of discrimination or noncombatant immunity; the definition of the criteria and its place within modern just war theory; the ethical tension between noncombatant immunity and military necessity in examples from WW II, the Vietnam War, and the Persian Gulf War; and how immunity and necessity are related in the just war theories of O'Brien and Ramsey. The study concludes that Ramsey's position is most consistent with a Christian ethical framework and that no synthesis of these two views is possible. This reflects an internal conflict between deontological and teleological principles within the just war ethic itself. The study suggests that the ethical tension between noncombatant immunity and military necessity can be ameliorated by a stricter application of the principle of double effect and by recasting military necessity as a moral rather than pragmatic principle.

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NONCOMBATANT IMMUNITY AND MILITARY NECESSITY: ETHICAL CONFLICT IN THE JUST WAR ETHICS OF WILLIAM V. O'BRIEN AND PAUL RAMSEY

A THESIS

SUBMITTED TO THE FACULTY OF THE

DIVISION OF CHRISTIAN THOUGHT

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IN PARTIAL FULFILLMENT OF REQUIREMENTS FOR THE DEGREE

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Dedicated to Marion, Jessica and Jonathan for their unfailing support, faithful prayers and willing sacrifice without which this project could not have been accomplished.

ABSTRACT

William V. O'Brien and Paul Ramsey are two modern just war theorists who have opposite views on the relationship between the jus in bello principle of discrimination and the international law principle of military necessity. The purpose of this study is to analyze their positions to determine which is most consistent with a Christian ethical framework and to explore the possibility of a synthesis of their views. The study covers the history of the development of the principle of discrimination or noncombatant immunity; the definition of the criteria and its place within modern just war theory; the ethical tension between noncombatant immunity and military necessity in examples from World War II, the Vietnam War, and the Persian Gulf War; and how immunity and necessity are related in the just war theories of O'Brien and Ramsey. The study concludes that Paul Ramsey's position is the most consistent with a Christian ethical framework; that no synthesis of these two positions is possible which reflects an internal conflict between deontological and teleological principles within the just war theory itself; and that the ethical tension between the principle of discrimination and military necessity can be ameliorated somewhat by applying a stricter definition of the principle of double effect to noncombatant immunity and by recasting military necessity as a moral principle rather than as a pragmatic statement of military realism.

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INTRODUCTION

Two of the most basic principles related to the conduct and restraint of war are the principles of military necessity and noncombatant immunity. The former is most commonly conceived of as the outworking of the proverb, "All's fair in love and war," and the latter as the substance of the ethical precept expressed within the Judeo-Christian tradition by the command "You shall not commit murder." Between these two extremes lies a vast range of potential ethical conflict.

Military necessity is a principle of military theory recognized in international law as part of the "Law of War." It is the basic principle of utility which legitimates the use of necessary means to accomplish the stated ends of war. Noncombatant immunity is also a principle of international law which stipulates that persons not directly or immediately involved in armed conflict are to be considered immune from direct attack by belligerents. It is also a criteria in the traditional just war theory governing the just conduct of war, the jus in bello. As such it has relevance not only as a legal principle, but more importantly as a moral one.

Within Western culture, the theory of the just or justified war has been the most influential means of guiding moral discourse on the nature of armed conflict. In spite of a history where the tradition has often been set aside and neglected it still continues to exert a profound influence upon ethical analysis of the ends and

means of war. One of the principle arguments lodged against the continued relevance of the theory today is that it has been rendered obsolete by the nature of modern warfare. Nowhere is this fact more clearly seen, than in the case of the just war principle of discrimination or noncombatant immunity.

Modern war is said to be "total war" in which all the members of a society are mobilized to support the war effort of the nation state. The close integration between the armed forces of a nation and the economic and industrial base that enables it to remain an effective fighting force make it impossible in practice to distinguish between combatants and noncombatants. Moreover, the nature of modern weapons, both conventional and nuclear, is such that they are incapable of of being used in a manner which discriminates between classes of people. In this context it is argued that the moral principle that those not directly involved in hostilities should be immune from direct attack is impossible to observe and is therefore functionally irrelevant to how wars are really fought.

For the supporter of the just war tradition, how one goes about weighing the validity of this argument will depend a great deal on whether one conceives of the principle of noncombatant immunity as an absolute or a relative moral principle. Within modern just war tradition William V. O'Brien and Paul Ramsey are two theorists who have adopted opposite views on this issue. Ramsey considers noncombatant immunity an inviolable moral absolute, while O'Brien considers it to be a relative moral principle which can be overridden.

This study will examine these two positions to determine which

is most consistent with a Christian ethical framework and to determine if a mediating synthesis of these positions is possible. A secondary concern will be to examine the relationship between the principles of noncombatant immunity and military necessity and to determine if the ethical tension that exists between them is capable of being reconciled. Does noncombatant immunity have any practical controlling influence over demands of military necessity? Must the utility of military necessity always take priority over the moral imperative of noncombatant immunity? Does modern war in fact make morality irrelevant?

In order to examine these questions I will first briefly describe the historical development of the concept of noncombatant immunity and then look at how the principle is understood today in the context of modern just war theory and in relation to the international law principle of military necessity. I will then examine several case studies reflective of the ethical tension between noncombatant immunity and military necessity. The positions of William O'Brien and Paul Ramsey on noncombatant immunity and its relation to military necessity will then be examined and analyzed, and my conclusions will be presented.

I. HISTORICAL DEVELOPMENT OF NONCOMBATANT IMMUNITY

1. CHRISTIAN PACIFISM IN THE EARLY CHURCH FATHERS

That the early church generally held a pacifist attitude towards war and military service is a widely accepted view, especially among modern Christian pacifists. While pacifism was the belief of many early Christians, it has been shown that it was by no means the universal position of the early church.[1] It is especially important to qualify claims of pacifism for the early church depending upon what time period is involved. Until 170-180 AD, there is no evidence of Christians serving in the army. The earliest instances of Christians in the military is in the year 173 AD with the "Thundering Legion" under Marcus Aurelius. By 197 AD, Tertullian could refute the charge that Christians were anti-social by pointing out their involvement in many social and political institutions including the army.[2] The fact that he warned against the practice of voluntary enlistment shows that it was a practice with which Christians were involved.[3] He also maintained that

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[1] Edward A. Ryan, "The Rejection of Military Service by the Early Christians", Theological Studies 13: 1-32, 1952, cited in John J. Davis, Evangelical Ethics (2nd Ed.), Phillipsburg, N.J.: Presbyterian and Reformed, 1993, pg 267. Ryan shows that pacifism was not the universal position of the early church prior to Constantine and that pacifist sentiment was most commonly related to concerns over the association with idolatry that military service entailed. See also, James T. Johnson, The Quest For Peace: Three Moral Traditions in Western Cultural History, Princeton: Princeton University Press, 1987

[2] Apologeticus, XXXVII, cited in Roland Bainton, Christian Attitudes Toward War and Peace, Nashville: Abingdon, 1960, pg 68

[3] De Corona Militis, XI, cited in Ibid., pg 68

many soldiers left the army upon their conversion. Cyprian referred to two soldiers who died as martyrs under the Decian persecution in 250 AD and similarly, there were accounts of Christian soldiers who were killed for their faith during the persecution under Galerius in 303-4 AD.[4]

Pacifism in the early church seems to have been most prevalent in the Hellenistic East and in the interior provinces of the empire, while evidence of Christians in the Army is greatest from those frontier areas threatened by barbarian invasion. The most notable instance of this is the Thundering Legion which was stationed in the Melitine Province of southern Armenia. Armenian Christians in this same province resorted to arms to defeat an attempt to enforce idolatry by the emperor in the early fourth century. The eastern frontier generally showed the most evidence for a long tradition of military service by Christians prior to the time of Constantine. Roland Bainton's summary of the situation is that after an initial silence on the subject at the close of the New Testament era there is a gradual increase in the incidence of Christians serving in the army that was largely geographically dependent.[5]

> "The evidence, then, for Christians in the armed forces before the time of Constantine adds up to this: until the decade AD 170-80 we are devoid of evidence; from then on the references to Christian soldiers increase. The numbers cannot be computed. The greatest objection to military service appears to have been in the Hellenistic East. The Christians in northern Africa were divided.

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[4] Epistolae, XXXIX, 3; Eusebius, Historia Ecclesiastica, VIII, cited in Ibid., pg 68

[5] Ibid., pgs 67-72

> The Roman Church in the late second and third centuries did not forbid epitaphs recording the military profession. The eastern frontier reveals the most extensive Christian participation in warfare, though concurrently we find there a protest against it among groups tending to ascetic and monastic ideals."[6]

At the same time that there were Christians serving in the army, most of the notable apologists and theologians of the faith spoke against military service and participation in warfare. Prior to 180 AD such pronouncements usually condemned violence in general. Athenagoras, for example, refuted the charges of cannibalism leveled against Christians by reference to the fact that "...we cannot endure even to see a man put to death, though justly, who of them can accuse us of murder or cannibalism?"[7] By the mid-third century, military service specifically was denied. Origen argued that the Christians did more to help the commonwealth by their prayers than by fighting: "And none fight better for the king than we do. We do not indeed fight under him, although he require it, but we fight on his behalf, forming a special army - an army of piety - by offering our prayers to God."[8] Tertullian was very clear in declaring that "...the Lord, afterward, in disarming Peter, unbelted every soldier" and asked rhetorically, "Shall it be held lawful to make an occupation of the sword, when the Lord proclaims that he

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6 Ibid., pg 71

7 A Plea for Christians 34-35, trans., B.P. Pratten, in The Ante-Nicene Fathers Vol 1, in Arthur Holmes, War and Christian Ethics, Grand Rapids: Baker, 1975, pg 37

8 Against Celsus 3:7, trans. F. Crombie, The Ante-Nicene Fathers Vol 4, in Holmes, pg 49

who uses the sword shall perish by the sword?"[9] Lactantius in 304-5 AD, declared that, "Participation in warfare therefore will not be legitimate to a just man whose military service is justice itself."[10]

Modern interpreters have offered various reasons for the denial of military service in the early Fathers. The most common suggestions have been that the church was concerned to avoid the danger of idolatry associated with the cult of the emperor that was requisite for military service; that the early church was loath to be involved with the army during this period when it still was under persecution; and that the eschatological expectations of the church made the preservation of the empire a matter of indifference in the face of the Lord's immanent return.[11] Probably the most fundamental reason, however, was that the early Christians simply found the requirement of love incompatible with killing. This

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[9] On Idolatry 19; The Chaplet 11, trans. S. Thelwall, in Ante Nicene Fathers Vol 3, in Holmes, pgs 44, 45

[10] Divinae Institutiones, VI, xx, 15-16, cited in Bainton, pg 72

[11] James T. Johnson has suggested that this eschatological perspective is a more persuasive explanation of the church's acceptance of military service at the time of Constantine than the standard "Constantinian Captivity of the Church" model put forth by many modern pacifist writers. Johnson argues persuasively that the initial rejection of military service was part of a general eschatological separatism that gradually declined as the church readjusted its hope of the immanent return. What was declined was not violence as such, but close involvement with the world, soon to "pass away". As this readjustment took place at different rates in different parts of the empire, different attitudes towards military service developed. The general change which took place at the time of Constantine, therefore, was not a radical revolution in Christian thinking, but the end result of a gradual consolidation of more positive acceptance of wider involvement in the affairs of the state. See: James T. Johnson, The Quest for Peace: Three Moral Traditions in Western Cultural History, pgs 1-17

understanding is supported by the fact that some of the early writers allowed for military service in a police function so long as bloodshed was not involved.[12]

2. DEVELOPMENT OF THE JUS AD BELLUM

A. Ambrose of Milan:

The first conscious effort to develop a synthesis of Roman just war thought and Christian morality was provided by Ambrose, bishop of Milan, in his work On the Duties of the Clergy, written in 386-87 AD. As the pretorian prefect of northern Italy prior to his elevation to bishop, Ambrose was intimately familiar with both Roman law and the writings of Cicero on the jus belli, which influenced his thinking on war and military service. He believed that just wars were defensive in nature, agreements in war should be kept, deceit and unfair advantage should not be taken, and that the vanquished should be shown mercy. Ambrose' basic conception was that only just wars were morally legitimate as understood within the context of the traditional philosophical virtues of justice and fortitude.

> "Fortitude, therefore, is a loftier virtue than the rest, but it is also one that never stands alone. For it never depends on itself alone. Moreover, fortitude without justice is the source of wickedness. For the stronger it is, the more ready it is to crush the weaker, whilst in matters of war one ought to see whether the war is just or unjust. David never waged war unless he was driven

[12] Bainton, pgs 73-81

> to it. Thus prudence was combined in him with fortitude in the battle."[13]

From his background in imperial administration Ambrose viewed the role of the soldier who defended against barbarians and protected the citizen from thieves as a role essential to justice. Justification for war in the defense of the empire also coincided with the defense of the faith in Ambrose' thinking, since the barbarians threatening from the north were Arians. For Ambrose, orthodoxy could and should be defended with force.

While rejecting personal self-defense against attack, Ambrose saw the defense of another's life as a moral obligation that demanded the use of force if necessary. Significantly, the basis for this view of morally required defense is not the principle of self-defense as recognized in Roman law but the Christian view of the duty to show love to the neighbor. Where force is required to preserve the good of society and to protect the lives of the innocent, the Christian is justified in participating in the defense of the helpless.

> "Some ask whether a wise man ought in case of a shipwreck to take away a plank from an ignorant sailor? Although it seems better for the common good that a wise man rather than a fool should escape from shipwreck, yet I do not think that a Christian, a just and a wise man, ought to save his own life by the death of

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[13] Ambrose, Duties of the Clergy, I,XXXV, 176-177, in Phillip Schaff and Henry Wace, A Select Library of Nicene and Post-Nicene Fathers of the Christian Church, (2nd Ed.), Vol X, Grand Rapids: Eerdmans, 1979, pg 30

> another; just as when he meets with an armed robber he cannot return his blows, lest in defending his life he should stain his love toward his neighbor. The verdict on this is plain and clear in the Gospels."[14]
>
> "The glory of fortitude, therefore, does not rest only on the strength of one's body or of one's arms, but rather in the courage of the mind. Nor is the law of courage exercised in causing but in driving away all harm. He who does not keep harm off a friend, if he can, is as much in fault as he who causes it. Wherefore holy Moses gave this as a first proof of his fortitude in war. For when he saw an Hebrew receiving hard treatment at the hands of an Egyptian he defended him, and laid low the Egyptian and hid him in the sand. Solomon also says: 'Deliver him that is led to death.'"[15]

Ambrose thus recognized the legitimacy of military service for the Christian, but he drew a distinction between the clergy and the laity with the former being restricted from participation in war by virtue of the nature of their office. In this regard Ambrose begins the development of two principles that continued to influence just war theory into the middle ages: the notions of just purposes in war (just cause) and the principle that certain classes of persons should be exempt from war's involvement (noncombatant immunity).[16]

"We have discussed fully enough the nature and force of

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[14] Ibid., III, IV, 27, in Ibid., pg 71

[15] Ibid.,I, XXXVI, 179, in Ibid., pg 30

[16] Johnson, The Quest for Peace, pgs 53-56; Bainton, pgs 90-91; Frederick Russell, The Just War in the Middle Ages, Cambridge: Cambridge University Press, 1975, pgs 13-15; Sydney Bailey, Prohibitions and Restraints in War, London: Oxford University Press, 1972, pgs 4-5

> what is virtuous from the standpoint of justice. Now let us discuss fortitude, which (being a loftier virtue than the rest) is divided into two parts, as it concerns matters of war and matters at home. But the thought of warlike matters seems to be foreign to the duty of our office, for we have our thoughts fixed more on the duty of the soul than on that of the body; nor is it our duty to look to arms, but rather to the affairs of peace. Our fathers, however, as Joshua, the son of Nun, Jerubbaal, Samson, and David, gained great glory also in war."[17]

B. Augustine:

Augustine is universally regarded as the father of just war doctrine in the classic Christian tradition. In his formulation of the theory, which focused almost entirely on the jus ad bellum, Augustine drew from Roman law and biblical teaching to form a synthesis which legitimized the Christian's participation in war in a more comprehensive form than the initial work of Ambrose.

In order for a war to be "just", the purpose for which it was waged had to reflect a proper intention. For Augustine, this meant that its ultimate end must be to restore the peace. War was not to be an end unto itself. The ultimate purpose of war was not killing for its own sake, and if victory could be achieved without the shedding of blood, it was a preferable option to the misery and suffering that was the inevitable consequence of war. Augustine was clearly aware of the paradox that although war was the very antithesis of peace, nevertheless in some instances it was only by the means of war that peace could be gained. The principle that war

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[17] Ambrose, I, XXXV, 175, in Schaff and Wace,Vol X, pg 30

was to be conducted with a proper intention was an example of the Christianizing influence which Augustine brought to bear on the Roman concepts of justice in war. The real evil of war was not death, for death comes to all eventually, but the way in which the sinful attitudes and passions of the inner heart of man are unleashed (see quote below). Right intention is not only the absence of sinful passions in the heart, but positively, it is a desire to see justice vindicated and most importantly, that peace might be restored.

> "Peace should be the object of your desire; war should be waged only as a necessity, and waged only because God may by it deliver men from the necessity and preserve them in peace. For peace is not sought in order to the kindling of war, but war is waged in order that peace may be obtained. Therefore, even in waging war, cherish the spirit of a peacemaker, that, by conquering those whom you attack, you may lead them back to the advantages of peace."[18]

The just war was conducted to vindicate the cause of justice, although Augustine did not believe that in the "earthly city" any justice could be perfect apart from faith in God. Generally, Augustine adopted the view that war was just it if was intended to right wrongs which had been done, to avenge or punish injuries, or to protect and defend the public good. An important premise in his thinking was the maintenance of order as essential for the existence of whatever "relative" justice the state could provide. Public order was for the good of all and if it was threatened by those who sought

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[18] Augustine, Letter 189:6, To Boniface, in Ibid., Vol 1, pg 554

to do evil the Christian could lawfully defend it by the use of force.

> "The real evils in war are love of violence, revengeful cruelty, fierce and implacable enmity, wild resistance, and the lust of power, and such like; and it is generally to punish these things, when force is required to inflict the punishment, that in obedience to God or some lawful authority, good men undertake wars, when they find themselves in such a position as regards the conduct of human affairs, that right conduct requires them to act, or to make others act in this way."[19]

> "For it is the wrongdoing of the opposing party which compels the wise man to wage just wars; and this wrongdoing, even though it give rise to no war, would still be a matter of grief to man because it is man's wrong-doing."[20]

Like Ambrose, Augustine denied the use of force for self defense since this would involve an act of hatred and a desire for self preservation that would be contrary to the basic command to love the neighbor. The same love that denied killing in self defense, however, made killing permissible when done as a public office or in obedience to God's explicit command, because then the purpose of the act was the defense of the neighbor's life rather than one's own, which was an act of love. A key principle in determining whether killing could meet this test of being a public rather than a private action was the notion of right authority to declare war and justify the use of force as a proper exercise of that authority. This was vested in the sovereign who was ultimately appointed by God and

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19 Augustine, Reply to Faustus the Manichaean, XXII:74, in Ibid., Vol 4, pg 301

20 Augustine, The City of God, XIX:7, in Ibid., Vol 2, pg 405

under His providential control. Just as it was in God's power to lift up or cast down a sovereign, so too, it was in his power to use war for his own inscrutable purposes, to chasten men for their sin or to punish them for their wickedness. Soldiers were men under authority and were obliged to obey that authority even when it was unrighteous.

> "Otherwise John (the Baptist), when the soldiers who came to be baptized asked, 'What shall we do?' would have replied, 'Throw away your arms, give up the service;never strike, or wound, or disable anyone.' But knowing that such actions in battle were not murderous, but authorized by law, and that the soldiers did not thus avenge themselves, but defend the public safety, he replied....A great deal depends on the causes for which men undertake wars, and on the authority they have for doing so; for the natural order which seeks the peace of mankind, ordains that the monarch should have the power of undertaking war if he thinks it advisable, and that the soldiers should perform their military duties in behalf of the peace and safety of the community....For there is no power but of God, who either orders or permits. Since, therefore, a righteous man, serving it may be under an ungodly king, may do the duty belonging to his position in the state in fighting by the order of his sovereign,...how much more must the man be blameless who carries on war on the authority of God..."[21]

While Augustine did not dwell at great length on the manner in which war was to be conducted, he did reiterate some of the basic principles that were well known, though often ignored, in antiquity. There was to be no profanation of holy places, looting, burning or

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[21] Augustine,Reply to Faustus the Manichaean, XXII:74-75, in Ibid.,Vol 4, pg 301

massacre. The use of force was not to be turned into an excuse for wanton violence, but the vanquished foe was to be shown mercy. While ambush was a permissible tactic in war, the use of deceit or treachery was not. The enemy was to be dealt with in good faith. Like Ambrose, he also disallowed the clergy and monks from participation in warfare.

> "Let necessity, therefore, and not your will slay the enemy who fights against you. As violence is used towards him who rebels and resists, so mercy is due to the vanquished or the captive, especially in the case in which the future troubling of the peace is not to be feared....For when faith is pledged, it is to be kept even with the enemy against whom the war is waged, how much more for the friend for whom the battle is waged."[22]

In developing his theory of the just war which he articulated in terms of the principles of just cause, right intention and legitimate authority, Augustine laid the groundwork for later development of the jus ad bellum.[23]

C. Thomas Aquinas:

Thomas Aquinas, writing in about 1270, is regarded as the primary source for the basic medieval formulation of the jus ad bellum. Following in the work of Augustine, Aquinas identified three criteria for the just war: legitimate authority, just cause, and right

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22 Augustine, Letter 189:6, To Boniface, in Ibid., Vol 1, pg 554

23 Johnson, The Quest for Peace, pgs 56-66; Bainton, pgs 91-100; Russell, pgs 16-26; Bailey, pgs 6-9

intention. The sovereign alone is vested with authority to institute war whereas the private individual who has a grievance is to seek redress from the tribunal. The just cause for a war must be to vindicate a wrong which has been committed against the injured party. Right intention means that the just belligerent intends to promote the good and is not motivated by the desire to do evil against the enemy. The ultimate end of war reflective of right intent is the reestablishment of peace.[24]

While Aquinas' work was a more systematic presentation of the basic thinking that Augustine had established, it did not go beyond it in fundamental detail. Where his work did show innovation was in the development and application of natural law principles to the analysis of just war doctrine through the injection of Aristotelian philosophy into the Christian moral basis provided by Augustine. Aquinas did provided the foundation for what would later become a substantial input to the ethical conduct of war in his formulation of the principle of double effect, which will be discussed below. He also reiterated the traditional position that clerics were forbidden to participate in war.[25]

3. DEVELOPMENT OF THE JUS IN BELLO

A. Gratian and Late Medieval Just War Doctrine:

While most studies of just war doctrine properly begin their

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[24] Thomas Aquinas, Summa Theologia, II-II, Q40, Art 1-4, New York: Blackfriars-McGraw Hill, 1972, pgs 81-93

[25] Russell, pgs 258-264; Bailey, pgs 9-10

analysis of the historical development of the tradition with the works of Augustine[26], James T. Johnson has suggested that it is an error to conceive of the classic just war formulation of jus ad bellum and jus in bello of the late middle ages as existing in this well developed synthetic form in the work of such early writers in the tradition as Augustine and Aquinas.[27] This is especially the case with our concern here, the development of the principle of discrimination within jus in bello which was not treated extensively by these theologians who concentrated their efforts more on articulating the foundational elements of the jus ad bellum.[28]

Johnson suggests instead that a better place to begin an examination of the historical development of attempts to limit war during the Middle Ages is with the writings of Gratian in the mid-twelfth century (Decretals, 1148). This is due to the fact that even though Augustine used well recognized Roman principles of just war and made application of the biblical traditions of the Christian faith in formulating his theological justifications for Christian participation in war, it is only later with the work of Gratian that the just war tradition begins to be developed in an ongoing manner in a way that served to define the doctrine in its classic state. Aquinas himself drew from Gratian. What was most significant about the later developments that came out of Gratian's work was that they represented the many different sources of input into the

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[26] Bainton, Ch 6; Paul Ramsey, War and the Christian Conscience , Durham: Duke University Press, 1961, Ch 2; Russell, Ch 1

[27] James T. Johnson, Ideology, Reason, and the Limitation of War, Princeton: Princeton University Press, 1975, pg 26

[28] James T. Johnson, Just War Tradition and the Restraint of War, Princeton: Princeton University Press, 1981, pg 123

tradition.

Johnson attributes significance to the fact that the medieval just war tradition did not develop solely out of the realm of Christian theology. Rather, he distinguishes four sources, two religious and two secular, which contributed throughout the late medieval period to the development of the classic doctrine: the canon law traditions of the Decretists and Decretalists who commented on Gratian's work; the theological tradition typified by but not limited to Aquinas; the civil law applications of updated Roman jurisprudence; and the codes of chivalry institutionalized within the feudal caste system of knighthood.[29]

> "The two ecclesiastical sources drew ultimately upon Biblical and early Christian materials, but subjected them to interpretations importantly determined by the cultural context of medieval Christendom. The civil law, via its recovery and recasting of Roman law traditions, provided input from Roman imperial political and military theory and practice but went beyond this to legal formulations reflecting contemporary customs. The chivalric code, in numerous ways the most difficult to understand, besides reflecting both contemporary religious and cultural ideals, drew into itself fragments of older Germanic traditions on warfare, manliness, and the ideal of a soldier. An important reason behind the confluence of the above streams of thought and practice was that none of them, alone, provided a complete and well-developed doctrine on the just limits of war."[30]

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29 Ibid., pgs 121-123

30 Ibid., pg 123

Gratian's major contribution to the just war tradition was his massive compilation of canon law which collated texts from earlier writers. In the section of the Decretum dealing with just war (Causa 23) the influence of Augustine's work is clearly seen. In essence, Gratian reiterates Augustine's criteria and then makes applications of them to contemporary and hypothetical problems. Where Gratian's work did contribute to the development of the jus in bello was in the designation of classes of persons exempted from violence in warfare: clerics, pilgrims, monks, women and the unarmed poor. These restrictions were all in consonance with the earlier Peace of God efforts at developing a canonical basis for limitations on the conduct of war.[31]

B. Late Medieval Canon Law Restraints On War:

As mentioned above, the interests of church theologians from Augustine onward tended to focus around ethical concerns related to the foundational issues of the restraint of war under the category of jus ad bellum. Augustine himself had not addressed the matter of the way in which a just war was to be fought and in following his example, later theologians barely considered the principles of jus in bello until the fourteenth century. The earliest efforts at defining principles affecting the practical conduct of war by church authorities came from the canonists rather than the theologians. The three notable efforts at canonical restraint of war were the Truce of God and the Peace of God in the eleventh century and the

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31 Gratian, Decretum, Causa 24, Q 3, cc 22-25, cited in Russell, pg 70

pronouncements of the Second Lateran Council in the twelfth century.[32]

The Truce of God was an early effort to limit the violence of warfare by restricting the number of days upon which it could be conducted. The ban initially applied to warfare on Sundays, but eventually came to include all the important feast and holy days as well as the weekly Sunday vigil, the period from sunset on Wednesday to dawn on Monday. The ban was ineffective because it attempted to do to much and so was largely ignored. Additionally, the nature of siege warfare, which was the dominant form of war at the time and which depended less upon armed combat than the practice of investing and starving out the defenders of a fortress, meant that the Truce had little relevance for limiting warfare the way it actually was practiced.[33]

The Peace of God was more effective as a means of limiting the effects of war and serves as one of the foundations for the development of the jus in bello principle of noncombatant immunity. This canon law attempted to identify classes of persons who were to be exempt from participation in and from the effects of war. Initially applied only to clerics, monks and other religious personnel it came to include others involved in purely secular occupations that were seen as peaceful in nature. By the thirteenth century eight classes of people were identified: clerics, monks, friars, other religious, pilgrims, travelers, merchants, and peasants

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32 Johnson, Just War Tradition and the Restraint of War, pg 124

33 Ibid., pgs 124-126

cultivating the soil, as well as their animals, possessions and lands. The basic premise of the law was that these classes of persons were not involved in war making and so should be exempt from its effects. The list is obviously not comprehensive in that it doesn't include all classes of occupation which could be characterized as non-martial in nature. In this respect it doesn't stand by itself as an attempt to justify the idea of noncombatancy. Nevertheless, it was far more relevant to the actual conduct of warfare that the Truce of God and it lead to further development of the principle of noncombatant immunity.[34]

The Second Lateran Council of 1139 was the third attempt at canonical regulation of warfare. Rather than attempting to restrict the time available for war or the persons by whom or upon whom it could be visited, this effort was an early experiment in arms limitation. The council banned the use of the crossbow, bow and arrow, and siege machines in warfare among Christians, although such weapons could still be used in war against heretics and the infidel. The ban was largely ineffective and had fallen into disuse by the middle of the thirteenth century. Rather than being a statement of opposition to the fact of war itself or a reflection of humanitarian concern to prevent unnecessary suffering in warfare, the ban was actually an early effort to build up the influence of the knightly tradition in war and limit the use of mercenaries, a practice opposed by the Church, by banning the weapons they most commonly used.[35]

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[34] Ibid., pgs 127-128; Bainton 109-112

[35] Johnson, Just War Tradition and the Restraint of War, pgs 128-130

Of the three attempts to limit the conduct of war before the time of Gratian the Peace of God was the only one to have significant impact on the later development of just war doctrine. The notion that certain classes of people should be exempt from the duties and the destruction of war was the foundation upon which the Church developed a basic doctrine of noncombatant immunity. This doctrine was consistent in many ways with some elements of the chivalric tradition which also had its own version of noncombatancy. By the fourteenth century the mutually affirming concepts of noncombatant immunity developed from these two sources were merged in a synthetic doctrine made possible by the shared religious and cultural context afforded by Christianity. While the Church, through the canonical work of Gratian and later in Pope Gregory IX's De Treuga et Pace, focused its position of noncombatant immunity on the delineation of protected persons by social class or function, most of those so protected were in effect Church functionaries. Johnson suggests that aside from the obvious factor of institutional self-interest, the Church formed its definition of immunity based on function rather than on the inability to bear arms because persons covered by this rationale were already recognized as immune from attack by the knight's code of chivalry.[36]

C. Medieval Chivalry and Noncombatant Immunity:

The code of chivalry of the medieval knight was a system of

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36 Ibid, pgs 130-133

internal class values commonly found among warrior elites where participation in warfare is institutionalized and restricted.[37] The virtues of martial skill, loyalty, courtesy, and honor which were highly valued and deeply inculcated principles of knightly behavior which stemmed from use in combat came to define the class in a way that produced attitudes of both rejection and condescension towards those outside. It is this principle of condescension, born of the pride of belonging to a privileged and distinct social group, that lead to the development of the code that knights were bound to protect the weak and the innocent: women, children, the sick, the aged, clergy and monks, and those involved in peaceful pursuits. While canon law and the chivalric code both identified classes of noncombatants, the kinds of persons considered eligible for immunity and the rationales behind that immunity were vastly different. The Church viewed immunity as a right of noncombatants based on the principle of noninvolvement. The code's concept of noncombatancy instead was based on the personal magnanimity of a superior to an inferior. Rather than a right, immunity was a privilege bestowed upon the noncombatant by the combatant, a privilege which in theory could be revoked, although only with great loss of status to the knight.[38]

> "Quite apart from the difficulties the Church encountered in enforcing its law under conditions of

[37] For a definitive study on the code of chivalry and its relation to the development of the medieval law of war, see: M.H. Keen, The Laws of War in the Late Middle Ages, London: Routledge and Kegan Paul, 1965

[38] Ibid., pgs 133-138; Keen, pgs 19-22, 242-247

> actual warfare, the central point is that the noncombatant, in the Church's conception, deserved his treatment by right. Quite the reverse is true of the chivalric version of noncombatant immunity, founded in the exclusiveness and condescension of a code morality and expressed foremost in the relation of protector to protected. The immunity and protection from harm extended by the knight to the weak and the innocent, on this conception, was a gift from the knight, offered to inferiors from one who is superior."[39]

The canonical and chivalric views of noncombatant immunity were gradually merged so that by the late fourteenth century the categories of noncombatants were essentially treated as one by both the Church and the chivalric code. Henri Bonet, writing in the last half of the fourteenth century, mixed the two groups of noncombatants together with no apparent distinction in his treatise on war, The Tree of Battle. Bishops, abbots, monks, doctors of medicine, pilgrims, women, blind persons, all other men of the Church, the deaf, the dumb, woodsmen, farmers, as well as some animals were all declared immune from attack. Only those actively engaged in hostilities were to be considered as combatants. While Bonet does not explicitly state the rational for protection as being that of a right, this understanding is implicit in his distinction between combatants and noncombatants.

In the work of Bonet's disciple, Christine de Pisan, however, the appeal for observance of noncombatant immunity is made to knights on the basis of their knightly virtue and chivalric duty (Livre des

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[39] Johnson, Just War Tradition and the Restraint of War, pg 138

Fays d'Arme et de Chevalerie). While a certain degree of moralistic idealism characterized such late medieval discussions of immunity in canon law, the chivalric code tended to apply the principe with a more relativistic bent that reflected both the provisional character of noncombatancy within the code and the realities of medieval warfare. In spite of the differences in the traditions, though, a genuine synthesis did take place at that time. The greatest significance of this synthesis was that it reflected the effort of the entire culture of medieval Europe to establish limits on the conduct of warfare.[40]

D. The Medieval Synthesis of Noncombatant Immunity:

The synthesis developed in medieval Christendom on noncombatant immunity established the model for subsequent development and discussion of the principle within the just war tradition. The two defining criteria of immunity, function in society and degree of association with hostilities, continue to be the defining principles for noncombatancy in modern efforts in international law. Within the medieval writings, the emphasis was on defining who were noncombatants because the presumption was, based on the chivalric code, that combatants would know how to treat those who were given immunity once they were identified. By contrast, much of modern international law is ambiguous as to the the exact definition of noncombatants and focuses attention rather on the humane treatment to be given them, whoever they may be.

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40 Ibid., pgs 140-143; Keen, pgs 21-22, 189-196

This has much to do with the changes in the nature of warfare, but also is related to the lack of a unified cultural, religious, moral tradition or civilization by which a consensus on what constitutes humane treatment can be assumed to be common knowledge.

Above all, Johnson suggests, it must be recognized that the medieval synthesis which produced the principle of noncombatant immunity was a compromise between two sources of cultural influence with fundamentally different presuppositions and assumptions about the nature and the source of the principle of immunity. It was not primarily or solely a Church doctrine grounded in theological principles or clearly stated moral imperatives of the Christian faith.[41]

4. THE TRANSITION TO MODERN INTERNATIONAL LAW JUS IN BELLO

A. The Early Jurists: Victoria, Suarez, Ames

The medieval principle of noncombatant immunity carried over into the modern era with the work of the early international jurists in the sixteenth and seventeenth centuries. Greater attention was accorded by these writers to the development of the jus in bello with particular emphasis on noncombatancy understood as a fundamental differentiation between the relative guilt or innocence of those present in war. This distinction is itself a development of the medieval Church concept of noncombatancy based on people's functions respective to the prosecution of a war. For the jurists,

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41 Ibid., pgs 143-149

innocence was determined by a lack of direct contribution to the war effort while guilt meant direct involvement in the prosecution of the war.

The Spanish writer Franciscus de Vitoria (c. 1483-1546) defined noncombatant immunity as a prohibition against the killing of the innocent, who have done no wrong. He listed specific examples as children, women (with the presumption of noninvolvement), clerics, religious, foreigners, guests of the enemy country, farmers and the civilian population generally not involved in hostilities. The intended, direct killing of the innocent was prohibited except in unavoidable situations where a just war could not be prosecuted any other way. The accidental killing of innocents in the storming of a city, for instance, while evil, was none the less necessary to avoid the greater evils of a just war failing. In such cases, the degree of innocent casualties must be regulated by the principle of proportionality.[42]

Francisco Suarez (c. 1548-1617) followed Vitoria's doctrine on noncombatant immunity fairly closely although he defined the innocent to include not only those listed in the canon law but also those who could ordinarily be classified as eligible combatants so long as they were not involved in the actual crime of carrying on the unjust war. While Vitoria and Suarez both advocated a position which increased the extent of noncombatant immunity by expanding the scope of those categorized as innocent in war, their view of "collateral circumstances" under which the innocent could be killed

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[42] Vitoria, The Law of War; The Rights of the Indians, in Holmes, pgs 118-136

left open the way for arguments against the principle of immunity in the name of military necessity. In addition, both Spaniards allowed for the spoilation of the innocent either as a matter of necessity or of retributive justice. In essence, while they regarded the killing or oppression of the innocent to be unjust, in certain cases it was permissible.[43]

William Ames (1576-1633), an English Puritan, developed a view of noncombatant immunity that sought to mitigate this tendency of military necessity to erode the limitations of restraints placed on warfare. In addition to the canon law lists of noncombatants, Ames adds children, women, and any men among the enemy who are not actively in support of the war effort. Active participation in the war effort is the grounds for determining noncombatancy. Those not directly involved should not be harmed as a matter of justice, not simply as an act of charity, which tended to make immunity an absolute principle in Ames' view. Ames recognized that the innocent may suffer, but argued that wars' effects upon them should be minimized as much as possible. In this regard he advocated banning the common practice of pillaging conquered towns specifically for the reason that this practice failed to discriminate between the innocent and the guilty. The best way to insure that a just war was conducted justly was to avoid doing all harm to noncombatants.[44]

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[43] Johnson, Ideology, Reason, and the Limitation of War, pgs 195-198; Suarez, On War, in Holmes, pgs 219-223

[44] Johnson, Ideology, Reason, and the Limitation of War, pgs 199-202

B. The International Lawyers: Grotius, Vattel

While noncombatant immunity as part of jus in bello made significant strides in the sixteenth and seventeenth centuries, it was a principle in transition. Jus in bello had assumed the primacy over jus ad bellum in discussion of just war doctrine, but it had not proceeded far enough to take a significant role in the actual limitation of warfare. The wars following the Protestant Reformation in Europe cast such doubt upon the validity of the jus ad bellum as a restraint on war, that subsequent efforts to develop a limiting doctrine focused almost exclusively on the development of the jus in bello by secular theorists rather than by theologians.[45]

In developing just war doctrine more consciously out of a foundation of natural law and the jus gentium, Hugo Grotius (1583-1645) represented a further shift in the transition to a secular jus in bello. With respect to noncombatant immunity, he advocated the general principle that the innocent were not to be punished with the guilty. The innocent in war included women, children, priests, students, husbandmen, merchants, and all captives. Noncombatants are delineated by their functions with regard to the war. In general, immunity was based on the fact that they did not bear arms in warfare. This and the fact that they had little or no say in the decision to go to war makes it unjust to punish them or demand retribution from them.[46]

Writing in the middle of the eighteenth century, the Swiss jurist

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[45] Ibid., pg 203

[46] Ibid., pg 227

Emmerich de Vattel (1714-1767) represents a fully secular jus in bello presentation of the principle of noncombatant immunity. While all citizens of an enemy nation are enemies, not all are guilty. Guilt is determined by functioning in such a way as to cause direct harm by participation in the enemy's cause. Guilt for the war attaches to the sovereign and those associated directly with his cause. Others in the enemy nation merely engaged in lawful occupations and peaceful pursuits are to be regarded as innocent. All who are unable to bear arms by the definitions of their own society are considered noncombatants.

The combination of inability and peaceful functions defines those classes of people considered immune: women, children, the aged, magistrates, clergy, teachers, and peasants working the land. The key principle for Vattel in determining immunity is the distinction between attitudes and actions. A citizen may in fact support his country in terms of his attitude towards the war, and in this sense is an enemy. Attitude alone, for Vattel, however, does not cause guilt. Guilt is determined by actions which contribute to the war.[47]

C. Noncombatant Immunity in the Modern Jus in Bello:

In discussing the continued application of the principle of noncombatant immunity, Richard Hartigan has suggested that beginning with the Treaties of Westphalia, the European states increasingly began to put the moral and legal principles of the just

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47 Ibid., pgs 246-251

war tradition into an effective body of laws and rules for observation in wartime. The period from the end of the Thirty Years' War to the French Revolution was characterized by development in the jus in bello that also reflected the change in warfare which took place. As war became increasingly more like a formal "duel" between professional armies, its destructiveness was limited increasingly by the exemption from its activities of the bulk of the civilian population.[48]

Though the Napoleonic Wars utilized the levee en masse, and more people were affected by the increase in the size of armies, battles and campaigns, the principle of immunity from attack for civilians was generally observed and continued to be developed in international law. By the end of the nineteenth century noncombatant immunity was generally accepted as a principle of positive international law. This general acceptance, however, has come to be threatened in the twentieth century by the development of the concept of total war.

The American Civil War is generally regarded by most just war theorists as the first war of the industrial age which marked the beginning of the transition to modern total war. The "countervalue warfare" of that conflict was perceived by advocates such as Union generals Sherman and Sheridan to be a critical means of undermining the capacity of the Confederacy to sustain the war. By World War I the belief that the entire population of the modern industrial state

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[48] R.S. Hartigan, "Noncombatant Immunity: Reflections on Its Origins and Present Status", Review of Politics 29: 204-220, 1966

was being mobilized to support the war effort and was therefore liable to attack contributed to the neglect of the principle of noncombatant immunity through practices such as maritime blockades, aerial bombardment of population centers, and unrestricted submarine warfare against merchant ships. During World War II the principle saw further erosion in the widespread practice of aerial bombing of cities, and in the increased interrelationship of the military to the industrial base due to the rise of highly mechanized warfare. With the advent of modern conventional and nuclear arms, the lethality of weapons has become such that many just war critics consider that they can no longer be used with discrimination between combatants and noncombatants.[49]

> "After centuries of development the principle of noncombatant immunity had achieved formal status. It is hardly necessary to recount the precipitate reversal that the principle has encountered in practice since the totalization of warfare in the twentieth century. It is precisely this issue of 'totalization' of warfare, as it pertains to the involvement of a nation's human resources, that has precipitated the present debate on the relevancy of noncombatant immunity."[50]

It is in the context of the ethical challenge posed by twentieth century total warfare, then, that we will examine the nature of the modern just war theory and the status of noncombatant immunity.

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[49] Ibid., pgs 216-217; William O'Brien, The Conduct of Just and Limited War, New York: Praeger, 1981, pgs 48-49

[50] Hartigan, pg 217

II. MODERN JUST WAR CRITERIA AND MILITARY NECESSITY

Given the variety of sources that just war doctrine has drawn upon in its development over the centuries, it is not surprising that its modern expression reflects much of the diversity of this historical background. Modern just war theory is at once a combination of theological insights into moral reasoning as well as those developed from moral philosophy, natural law, and the proscriptive standards of international law based on the practice and customs of the laws of nations. The earliest formulations of the tradition tended to focus on determining which side in a conflict had justice most in its favor, but as it developed, and as the difficulties in ascribing justice to only one belligerent party became obvious, the emphasis in the tradition shifted to the manner in which war was to be waged.

Modern standards of international law have placed sharp restrictions on the ability of nation states to resort to warfare as a legitimate means of realizing their claims to justice, and so modern formulations of the just war doctrine approach the tradition from a somewhat different perspective. Rather than focusing on determining the justice of a particular war, the tradition is better understood today as a means for moral reflection on the conditions which may make it permissible for nations to resort to war. War in the modern context is understood not as a legitimate option generally available to states to accomplish the diverse objectives of

national interest, but rather as an exception to a more internationally recognized principle of nonaggression which needs to be justified. For this reason, most modern writers, while still using the terminology of "just war", actually understand the moral framework that it entails as being that which defines war in terms of its permissibility rather than its intrinsic justice. A more accurate descriptive phrase that better captures the sense in which modern just war theory approaches the moral problem of war would be to speak of the theory as that of "permissible war" or "justified war"[51]

Examination of the criteria by which the permissibility of war is to be judged must begin with an awareness of the basic premise underlying the just war tradition: the presumption against the taking of human life. In order for this presumption to be overridden, significant justification must be given to warrant an exception to the rule. As Paul Ramsey has observed, the moral economy involved in determining the criteria for the use of force contains these "twin born" elements of justification and limitation. The very criteria which provide the justification for the taking of life also provide significant restrictions upon who may do so and how.[52]

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[51] O'Brien, The Conduct of Just and Limited War, pgs 13-16; Paul Ramsey, War and the Christian Conscience, pg 8; Both Ramsey and O'Brien make the same point about just war terminology. Permissible war is O'Brien's preferred alternative, justified war is Ramsey's. While pointing out the methodological rationale for a different terminology to define modern just war theory both Ramsey and O'Brien, like most modern commentators on the tradition continue to use the term "just war" because of the term's general recognition and for reasons of continuity with the historical tradition.

[52] Paul Ramsey, The Just War, New York: Scribner's, 1968, pg 144

James Childress has provided one of the most widely referred to explanations among modern just war theorists of the way just war criteria overcome the moral presumption against killing in terms of the distinction between prima facie and actual obligations.[53] A prima facie duty is one which we have a significant moral obligation to perform, but not necessarily an absolute one. Morally, it stands midway between an absolute and a relative duty. A prima facie duty is morally binding, but our exact obligation for performance of the duty will depend on how the act is understood within its total context. As human beings, the responsibility to avoid causing harm or injury to others is a prima facie obligation, which when violated, must always be justified. Childress argues that it is the presupposition of this prima facie duty not to harm others that, when overridden by the determination to go to war, provides the underlying moral criteria of the just war theory.

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[53] James Childress, "Just War Theories:the bases, interrelations, priorities, and functions of their criteria", Theological Studies 39: 427-445, 1978; see also, James Childress, "Just War Criteria", in Thomas Shannon, ed., War and Peace, Maryknoll, N.Y.: Orbis 1980, pgs 41-45; Additional analysis of the specific criteria of modern just war theory is provided in: John C. Murray, "Theology and Modern War", in William Nagle, ed., Morality and Modern Warfare, Baltimore: Helicon Press, 1960,pgs 69-91; Robert Osgood and Robert Tucker, Force, Order, and Justice, Baltimore: Johns Hopkins Press, 1967, pgs 248-322; Ralph Potter, "The Moral Logic of War", McCormick Quarterly 23:203-233, 1970; Ralph Potter, War and Moral Discourse, Richmond, Virginia: John Knox Press, 1973, Ch 5; Yehuda Melzer, Concepts of Just War, Leyden, Netherlands: A.W. Sijthoff, 1975, pgs 13-106; Michael Walzer, Just and Unjust Wars, New York: Basic Books, 1977, Chs. 8, 9; William O'Brien, The Conduct of Just and Limited War, Chs 1, 2; James T. Johnson, Just War Tradition, pgs xxi-xxiv; James T. Johnson and George Weigel, Just War and the Gulf War, Washington, D.C.: Ethics and Public Policy Center, 1991, pgs 20-30; For an analysis of contemporary misunderstandings of just war criteria, see: James T. Johnson, "Just War Theory: What's the Use?", Worldview 19:41-48, Jul-Aug 1976

> "First, because it is prima facie wrong to injure or kill others, such acts demand justification. There is a presumption against their justification and anyone who tries to justify them bears a heavy burden of proof. Second, because not all duties can be fulfilled in every situation without some sacrifices (this inability may be understood as natural or as the result of sin), it is necessary and legitimate to override some prima facie duties....War can thus be a moral undertaking in some circumstances. Third, the overridden prima facie duties should affect the actors attitudes and what they do in waging war. Some ways of waging war are more compatible than others with the overridden prima facie duties not to injure ot kill others. War can be more or less humane and civilized."[54]

In confronting the moral problem of war the conflict that exists is between the prima facie duty not to harm others and the fact that failing to do so will leave the innocent in society open to unjust repression and attack or will threaten the survival of a society and its values. The decision to use force comes from this conflict between prima facie obligations. The criteria of the modern just war theory, then, are the means of providing the ethical justification for this overridden prima facie obligation not to kill.

In commenting on the critical role that modern just war criteria play in moral decision making about war, J. Bryan Hehir has similarly pointed out that the moral framework which the criteria establish is intended to provide a limiting effect on the conduct of

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54 Childress, "Just War Theories", pg 433

war. The justification of war by just war theory does not mean that war must be fought, nor does it mean that if the decision is made to go to war, that any and all means are permissible in the conduct of the war. Within modern just war theory, resort to war is presumed to be illicit until proven to be justifiable. It is the careful weighing of the several criteria that provides the "moral calculus" by which such a presumption can be overcome.

> "When the just war ethic is legitimately invoked, the conclusion is that our actual moral duty is the need to use force as a last resort in defense of human life and the values that provide life with meaning and dignity. The just war ethic, with its stringent tests and structured moral vocabulary, is designed not to legitimate war as an acceptable activity in society, but to limit war to those cases, and only those, where supremely important values are at stake. In such instances the obligation to defend such values overrides the presumption not to use force."[55]

The traditional categories used to asses the permissibility of war in its inception and the manner of its conduct are those of the jus ad bellum and the jus in bello. Most modern writers on just war theory recognize six criteria that must be met in order to justify resorting to war and an additional two criteria that govern the proper conduct of war.[56] These criteria will be examined here in

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[55] J. Bryan Hehir, "The Just War Ethic and Catholic Theology: dynamics of change and continuity", in War or Peace, ed. Thomas Shannon, Maryknoll, New York: Orbis, 1980, pg 19

[56] Robert Holmes, "Can War Be Morally Justified?" in, Jean Elshtain, ed., Just War Theory, New York: New York University Press, 1992, pg 212; Holmes points out the

brief under the traditional categories.

1. JUS AD BELLUM: PERMISSIBLE RECOURSE TO WAR

A. Legitimate Authority:

In the classical just war tradition, the principle that a just war could only be declared by someone with the lawful authority to do so referred to a publicly recognized sovereign who was answerable to no politically superior ruler. The primary aim of the criteria in its original formulation was to limit the right to use force to those who were regarded as politically responsible for its consequences. It also provided an ostensible way to reduce the frequency of war by restricting the right to declare war to the sovereign and making the use of force by subordinate princes and others illegitimate. While the modern theory applies the principle of legitimate authority to the duly recognized political leadership of the sovereign state, the rationale behind the criteria is still essentially the same: to fix moral responsibility for initiating war upon those individuals socially recognized as acting with authority for the state and to

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great diversity in specifying just war criteria among modern writers, both in terms of their number and content, ranging from as few as five to as many as ten criteria. Much diversity exists in how the criteria are interpreted as well. Holmes maintains that the criteria of just cause for the jus ad bellum and discrimination and proportionality for jus in bello are about the only constants in just war criteria. For the purposes of this study I will be following the most common usage among modern just war theorists as typified by Richard Regan's recently published work on just war that deals not only with its principles of, but also their application to analysis of the most recent international conflicts in the Persian Gulf War, Somalia, and Bosnia. See: Richard Regan, Just War: Principles and Cases, Washington, D.C.: Catholic University of America Press, 1996

reduce the frequency of war.[57]

In the context of modern nation states, the decision to go to war must be made by those who are recognized within the political realm as having the legal right to act in such a capacity. Since war involves the use of lethal force and the taking of human life, society needs to place the authority to initiate such force in political institutions and personnel who are publicly recognized as having such authority, usually by means of constitutional and public law.

Within a constitutional democracy, ultimately it is the citizens who are the final arbiters of whether the decisions of their political leaders are truly reflective of the national will. Democratically elected leaders given constitutional powers to authorize the use of force generally have to convince the electorate that their decision to go to war is truly in the national interest. The determination as to who has the authority to commit the nation to war may be constitutionally diffuse. Prudence may dictate that American presidents, for example, even though given legitimate authority constitutionally to commit armed forces directly should seek political consensus from the legislative branch, which has the authority to declare war, before acting. The War Powers Act of 1973, passed by Congress in the wake of the involvement in Vietnam, limits the authority of the chief executive to commit armed forces for periods in excess of sixty days without seeking such consensus through consultation and eventual congressional authorization for actions surpassing the sixty day time limit. The

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57 Johnson and Weigel, pg 23-24

constitutionality of the War Powers Act has been questioned by all presidents since its passage, and although it has not been ruled on by the courts, the Act does reflect a generally held belief in American political culture that the large scale, long-term commitment of armed forces must be approved by Congress. In just war terms, the authority to utilize force derives greater legitimacy from a widespread political consensus as to the prudential nature of the decision.

Part of the reason for the concern that legitimate authority to declare war should reflect a social and political consensus in modern just war theory is the notion that force should only be used in the international community in the interests of justice and to uphold the moral order that makes human community possible. It is this notion of "world order" that is the basis of international law and the United Nations. In the international arena, legitimate authority to initiate war on behalf of the world community is vested in the United Nations Security Council by the U.N. Charter.[58]

One significant problem that modern warfare poses for the criteria of legitimate authority is that of civil or revolutionary war. With increasing frequency, groups and even individuals declare and conduct revolutionary warfare with questionable foundations for the legitimacy of their authority to do so. While the right to revolution is widely recognized in the world community, it is difficult to accommodate it to most of the criteria of just war thinking. The legitimacy of a modern revolutionary group's authority may be

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[58] Regan, pgs 20-24, 39-44

difficult to ascertain in the absence of a recognized political base or widespread popular support. Additionally, support that does exist for such groups is often coerced and therefore suspect. Generally, recognition of the legitimate authority of revolutionary groups is usually dependant on the success of the group in establishing a social or territorial base which will lend credence to their claim of representative authority.[59]

B. Just Cause:

Of all the just war criteria, just cause has undoubtedly received the most attention. This is due not only to its historical precedence in traditional just war theory, but also, as James Childress has pointed out, because the cause for resorting to war must be serious enough, as a competing prima facie duty, to overcome the prima facie obligation not to kill. Such a cause must be significantly weighty, because while there is a prima facie duty not to kill, there is no corresponding prima facie obligation to kill.[60]

Historically in the just war theory derived from Roman law and articulated by Augustine in his formulation of the earliest Christian apologetic for war; the criteria of just cause allowed for as many as three justifying reasons for war: self-defense, the recovery of values taken unjustly, and the punishment of evil. During the doctrine's classical development in the Middle Ages, the punishment of evil was emphasized as a cause by Aquinas.

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59 O'Brien, The Conduct of Just and Limited War, pgs 18-19

60 Childress, "Just War Theories", pg 444

Most modern explications of the criteria reflect the current status of international law as typified in Articles 2 and 51 of the United Nations Charter which refer to self-defense against imminent or ongoing attack as the only legitimate just cause for resort to war. Some modern theorists suggest, however, that the two older causes have not really been eliminated, but have been taken up into a wider concept of defense that allows for retaliation or reprisal for an unjust attack which has already been completed (i.e. punishment of evil) and which views the occupation of territory unjustly as a state of ongoing aggression.[61]

The notion of self-defense as a legitimate cause for resorting to war devolves from the inherent nature of the nation state as the means by which people in modern society organize themselves into political entities. As sovereign states, nations have a right to self existence which gives them a prima facie duty to defend their territorial integrity and their citizens against attack. This right to self-defense is based on the assumption that the nation has a legitimate claim to its territory and that by its actions it presents no just cause to another nation to attack it.

Modern international law requires nations to negotiate territorial disputes, and the failure of such negotiations does not provide just cause to resort to war. National self-defense also includes the right of nations to use force to defend their vessels and aircraft in international waters and airspace. Nations with rival claims on the

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[61] Johnson and Weigel, pg 21; O'Brien, The Conduct of Just and Limited War, pgs 25-26; Johnson and O'Brien both make this argument.

territorial or international status of open waters must likewise seek arbitration of these differences. The right to national self-defense as a just cause for war can be extended to include a nation's right to help another nation in its self-defense against unjust attack. The right to collective self-defense is a recognized point of international law as well.

Modern just war theory also recognizes several other conditions beyond maintaining territorial integrity which may necessitate the use of force in self- defense. Self-defense can also, under certain circumstances, be a just cause for a preventive attack against an unjust aggressor who is preparing to initiate hostilities.[62] Such a right of preventive attack is generally understood not to depend upon the requirement of an immanent threat, but there is a correlation between the immediacy of the danger and its legitimacy as a just cause. The more remote the danger of attack and the more opportunity there is to seek diplomatic solutions to the potential conflict, the less justifiable is the recourse to preventive war. Key to the legitimacy of such preemptive warfare is the certainty of the likelihood of attack by the aggressor nation and the credibility of the threat posed by the targets of the preemptive attack. Because they are in effect acts which break international peace, preventive attacks need to be based on the highest degree of certainty possible with no reasonable doubt about the hostile intent of the aggressor nation.

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62 William O'Brien, who also supports the legitimacy of preventive attack in the face of clear and present danger, refers to this as the right of "anticipatory self-defense"; O'Brien, The Conduct of Just and Limited War, pg 26

While it is generally accepted under international law that nations have the right to use military force to attempt to rescue their citizens from other countries which may detain them as hostages for political or policy reasons, such hostage taking does not constitute a just cause for initiating warfare in the form of reprisals to punish the guilty party. Similarly, nations have the right to use force against other countries which sponsor or harbor terrorist groups, but such attacks can only be to deter or prevent terrorist actions. Destroying terrorist bases or training camps, for example, would be actions to deter terrorism. Nations cannot claim terrorist acts against their nationals as just cause for offensive warfare against other nations. Maintaining the balance and distinction between punitive/offensive and deterrent/defensive use of military force against terrorists and their sponsors can be morally and practically difficult. The general principle, however, is that retribution and punishment are not acceptable as just causes for initiating military action.[63]

C. Right Intention:

While the classic formulation of the principle of right intention in just war theory applied to the moral attitudes of the individual sovereign and soldier involved in initiating and fighting the just war, the modern formulation of the criteria has reference primarily, though not exclusively, to the conduct and motives of the state. Positively, right intention consists in observing the objective goals

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[63] Regan, pgs 48-62

of the just cause: protecting the rights of the nation's citizens, preserving territorial integrity, reestablishing social order and maintaining or advancing peace.[64]

Right intention limits the conduct of the state to the avowed purpose of its just cause. The conflict cannot be used as an excuse, should the fortunes of war allow, to adopt new and fundamentally different goals from those of the just cause which legitimized the resort to war in the first place. Right intention also means that the ultimate object of going to war is the attainment of a just peace. Since a just peace is the goal, right intent will dictate that the state will not prosecute the war in ways that will add unnecessarily to the destruction and suffering war causes so that irreconcilable enmity will make the possibility of genuine peace more difficult. Underlying this concern not to jeopardize the potential for peace, is the principle that right intention preserves the humanity of the enemy. The enemy must not be dehumanized or depersonalized but treated with dignity and respect. The basic notion of love or charity seen in the objective standards of treatment of the enemy must not be abandoned if a criteria of right intention is to be preserved. [65]

While right intention is discerned mainly in the objective behavior of the state, the criteria is also aimed to a lesser degree at the subjective experience of the individual statesman or soldier involved in the conflict. Richard Regan suggests that right intention is reflected in the degree to which statesmen properly utilize moral

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[64] Johnson and Weigel, pg 24

[65] O'Brien, The Conduct of Just and Limited War, pgs 33-34

reasoning about war and act in the light of that reasoning. Right intent is most directly seen in whether the other criteria of just war theory are utilized in the decision to go to war and to conduct the war. In other words, a war initiated without due regard for a just cause or conducted in a manner that seriously violated the jus in bello criteria of discrimination and proportionality would by the objective nature of these actions demonstrate the absence of right intention among those who prosecuted the war.[66]

D. Proportionality of Ends:

The criterion of proportionality relates to the need to determine an acceptable balance between the over-all good that will be gained or preserved as opposed to the evil that will be done as a result of the decision to go to war. Involved in this calculation is consideration of the extent of the evil that has already been done or which can reasonably be foreseen as the consequence of an attack by an unjust aggressor, the relative evils produced by allowing the aggression to go unchallenged, the cost of opposing the aggression, and the benefits that such opposition might obtain.[67]

Because of the many variables that must be considered in evaluating the proportionality of the decision to wage war, this criterion is generally viewed as the most difficult to deal with. The weighing and balancing that it involves are made more difficult by the combination of factual and value judgements that are involved.

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66 Regan, pgs 84-85

67 Johnson and Weigel, pg 27

Judgements about the value of the cause that justifies the recourse to war will inevitably be influenced by subjective elements in the thinking of the individuals making such decisions. Estimates about the war's probable costs in terms of casualties and values destroyed can be based to some extent on objective criteria. However, even such objective criteria must be evaluated on the basis of hypothetical assumptions about how the war will develop and what its outcome will be.[68] Such assumptions can only be based on likely probabilities which can be skewed by the subjective optimism or pessimism of those who must analyse such costs. Most importantly, estimates about the costs cannot be considered only in an absolute sense, but must be weighed against the real value of the good that is to be obtained so that a decision as to their proportionality can be made.[69]

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[68] A good example of the way in which hypothetical assumptions can affect the weight of objective criteria in determining proportionality of ends is seen in the example of some of the casualty figures predicted for the coalition forces during the Gulf War. Initial estimates of allied casualties ranged between 10,000 to 60,000. These figures were based partly on the assumption that the ground war would be much longer than it turned out to be and also on the assumption that Iraq would use chemical weapons against coalition forces. In the months prior to the opening of the air war, many prominent military figures and politicians argued against the war on the basis of its potentially high cost in coalition lives and urged that sanctions be given more time to work. Coalition forces actually suffered only 304 total fatalities, a figure which when contrasted with the high numbers of Iraqi combatant and noncombatant casualties, has lead many critics of the war to question the validity of its jus ad bellum determination on the basis of a lack of proportionality. See: John Heidenrich, "The Gulf War: How Many Iraqis Died?", Foreign Policy, 90: 108-125, 1993; William O'Brien, "Desert Storm: A just War Analysis", St. John's Law Review 66:797-823, pgs 809-812; Alan Geyer and Barbara Green, Lines in the Sand: Justice and the Gulf War, Louisville, Kentucky: Westminster/John Knox Press, 1992, pgs 128-130, 147-161

While the calculations involved in determining the proportionality of ends in war have always been "multidimensional", William O'Brien points out that their complexity in the modern just war theory is further compounded by the vast increase in global interdependency that exists in the international realm of nation states today. Calculations of probable good and evil that will result from war must, therefore, be made for both parties to the conflict, as well as third party states that may be affected. The overall effect the war will have on the common good of the international community must also be factored in. Moreover, the calculation of proportionality is a dynamic criterion within the determination of a just war. While it must be addressed satisfactorily in the initiation of a war, it also must be continually reviewed and reevaluated during the conduct of the war, as the hypothetical estimates about the war's relative good and evil are replaced by empirical cases.[70]

While there is an objective element to determining proportionality in the use of force, i.e. the actual military resources available to resist the attack, for example, the criterion cannot be reduced to a simple mathematical calculation or a calculus of ends-means justification. Proportionality is preeminently a moral and political determination that often has to do with intangibles and values that are difficult to quantify such as human rights, national sovereignty, social and cultural integrity. The moral element of the calculation of proportionality is one that needs to be emphasized,

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[69] Regan, pgs 63-64

[70] O'Brien, The Conduct of Just and Limited War, pgs 27-28

especially in the face of the generally consequentialist character of the criterion.[71] John Courtney Murray, has emphasized this moral element in his discussion of proportionality, pointing out that what the criterion tries to force men to grapple with is " the comparison...between realities of the moral order, and not sheerly between two sets of material damage and loss."[72] Regan likewise highlights the importance of this moral element by pointing out the fact that, "Not every wrong suffered at the hands of another nation will proportionately justify the injured nation's waging war.the

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[71] Robert Tucker has critiqued proportionality in modern just war theory for lacking specificity and the capacity to actually restrain force because of this emphasis on the moral requirement to focus on the protection of essential values in war. He attributes this to the distinction between proportionality as understood within modern just war theory and in international law, where proportionality is simply a matter of the degree of effectiveness in accomplishing desired ends. See: Osgood and Tucker, pgs 300-301. .

[72] Murray, pg 80; In interpreting the teaching of Pope Pius XII on war, Murray emphasized this fundamentally moral character of proportionality in a way that is not as evident in more recent modern discussion of this criterion especially by writers with pacifist sentiments, who in critiquing just war theory tend to treat proportionality in the reductionistic manner that Murray warned against, rather than taking full consideration of the moral values that the principle demands be weighed. "The standard is not 'a eudaemonism and utilitarianism of materialist origin,' which would avoid war merely because it is uncomfortable, or connive at injustice simply because its prevention would be costly. The question of proportion must be evaluated in more tough minded fashion, from the viewpoint of the hierarchy of strictly moral values. It is not enough simply to consider the 'sorrows and evils that flow from war.' There are greater evils than the physical death and destruction wrought in war. And there are human goods of so high an order that immense sacrifices may have to be borne in their defense. By these insistence Pius XII transcended the vulgar pacifism of sentimentalist and materialist inspiration that is so common today." (emphasis added) Murray's point could well be directed at much of the pacifist sentiment evident within contemporary Catholicism following the pronouncements on war by popes subsequent to Pius XII. See: Brian Wicker, ed., Studying War No More: From Just War to Just Peace, Kampen, Netherlands: Kok Pharos Publishing, 1993.

wrong threatened or suffered should equal or surpass the destructive human and material costs of waging war."[73]

E. Reasonable Hope of Success:

In weighing the criteria for resorting to war, an additional element is a prudent analysis of whether the use of force will have a reasonable hope of success in vindicating the just cause of the war. The principle challenge this criterion poses for the calculation of permissibility of war is some internal definition of what constitutes "success". Obviously, success in war will depend on a variety of factors which need to be examined prior to the decision to go to war. In some respects this criteria bears a close association with the criterion of proportionality, because the definition of success will necessarily be affected by the relative proportion of good achieved in relation to the evil results of the war.

While the basic goal of the modern just war theory is to determine the permissibility of war as a means of preserving socially determined values, the specific uses of force within a general conflict may have many other aims subordinate to the overall goal. In some cases, such aims may not be legitimately justified by the use of force. In general, a reasonable hope of success in war can be understood as the creation of those conditions which will allow for the realization of the desired social values by removing the conditions which threaten their survival. Whether or not the desired social values actually come to fruition will depend

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[73] Regan, pg 48

upon the more general work of political statecraft, not the use of war itself. In other words, "success" in war can mean the establishment of a situation in which order, peace, and justice are no longer threatened by outside aggression, but whether or not those values are realized in actuality will depend on social and political developments subsequent to the war itself.[74]

A key principle that modern just war theory applies to the definition of a reasonable hope of success is that the just use of force must not be applied to accomplish ends beyond its means. This is why "success" in war must be defined by specific and limited ends that are achievable by the means contemplated and also why the jus in bello of the just war tradition is so important. It is by the restraints of the jus in bello that the means of war are morally defined, and so the "ends" which can be reasonably hoped for determined. Reasonable hope of success is based on the legitimacy of the just cause for war and the intention involved in going to war. It means having a reasoned and prudential probability of achieving

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[74] O'Brien, The Conduct of Just and Limited War, pg 90; It is important to distinguish the concept of success in just war theory from that of success in traditional political - military terms in which success usually means "victory". O'Brien makes the point that in the Korean War, the definition of success was the defense of South Korea and the deterrence of further aggression by North Korea. He argues, that if the definition of success from World War II, i.e. complete defeat and unconditional surrender, been applied to North Korean, there is every likelihood that the Soviet Union would have joined with China in opposing the intervention, causing the United States to utilize the Nationalist Chinese against mainland China with a resulting conflict that would have made "hopes for success through victory...so far-fetched as to fail to meet the requirements of probable success." In just war terms, success is limited to the achievement of the declared just ends.

the stated ends of the use of force within the boundaries of the means allowed.[75]

As with proportionality, though, John Courtney Murray also reminds us, that the principle of "success" cannot be determined in isolation from a clear set of moral values. "This condition of probable success is not, of course, simply the statesman's classical political calculus of success. It is the moral calculus that is enjoined in the traditional theory of rebellion against tyranny."[76] Success cannot be determined solely on the basis of prudential calculations of political realism, but must also include a moral dimension in its considerations.

This raises an important question regarding the criterion of success: can a war of self-defense be morally fought regardless of the chances for success if there is a significant threat to the continued existence of the state and its values?[77] On one hand it could be argued that the sacrifice of large numbers of human lives in warfare in which there was no reasonable hope of success would be immoral since their deaths would be the pointless means to an unattainable end. Moreover, the absence of a reasonable hope of success raises doubts about the criterion of proportionality as well, since the evil done would ostensibly outweigh the possible good that could be attained. On the other side, though, Murray's position might well suggest that such a decision can be morally permissible on the basis of his view that some evils are worse than death and some

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75 Johnson and Weigel, pgs 28-29

76 Murray, pg 80

77 O'Brien, The Conduct of Just and Limited War,pg 31

values are worth sacrificing everything for. In either case the limits on this criteria are not clear in modern just war theory.[78]

F. Last Resort:

The last criterion of modern just war theory is the principle that the resort to war is indeed the last resort. Before initiating military action, states need to determine whether there are other non-violent alternatives available to them. The principle of last resort must be based on judgements of prudence. It does not mean that every and all possible nonmilitary options must be investigated and tried before defensive force can be used to turn back aggression. Nor does it mean that other means must be tried indefinitely. Other methods may be tried first if time and opportunity permit. The criterion means that a judgement must be made as to whether or not the use of force will be the only reasonable means by which the ends determined by the other just war criteria will be able to be achieved.[79] While the determination that the state of last resort has been reached is based on rational and prudential analysis, it must still be informed by moral values, since it is the final moral bar to the presumption against the taking of life that war necessitates. The determination that the last resort must be used

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[78] In commenting on this point Joseph McKenna, another Catholic just war theorist, has stated: "In extreme cases, the moral value of national martyrdom may compensate for the material destruction of unsuccessful war, as with Belgium in 1914." Modern just war writers are not unanimous in this opinion, however. See, Joseph McKenna, "Ethics and War: A Catholic View", American Political Science Review 54:647-658, 1960, pg 651

[79] Johnson and Weigel, pg 29

must never be made without informed moral reflection on the consequences of this action.

Where the threat of attack is not immediate, negotiations between states may be undertaken if there is a reasonable expectation that they will resolve the situation peacefully.[80] In a situation where a state is under direct and unjust attack, there may be little choice but to resist the attack with military force or surrender. States that have been attacked and suffered the loss of values may not consider offers to negotiate a settlement by the aggressor to be legitimate in the absence of some evidence of sincere intent. The offer of negotiations may be only a diversion to gain time for further military advantage by the aggressor. Additionally, the victims of the aggression may be adversely affected by open ended delays in restoring their situation to the status quo ante bellum. All such factors must be taken into consideration in determining the criterion of last resort.

Increasingly in international conflicts, the threat of economic sanctions is used as an alternative to war. Often it is argued that the use of economic sanctions should be given the opportunity to

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80 O'Brien, The Conduct of Just and Limited War, pg 31: O'Brien has made the observation that in the context of the international community's extensive provision of the "machinery" of arbitration to aid belligerents in negotiating their disputes, the rule of thumb that international jurists and statesmen have adopted is that, "the state that fails to exhaust the peaceful remedies available before resorting to war is prima facie an aggressor." In spite of this presumption, though, O'Brien points out that for a number of reasons, routine use of this negotiating apparatus is disappointing. States generally are unwilling to commit matters of vital national interest to outside arbitration, preferring to protect them instead with the use of force or its threat.

force an aggressor to capitulate before war is initiated.[81] In this case, the failure of sanctions to bring about the desired end becomes the determining factor in deciding when the point of last resort to war has been reached. There are, however, significant problems with this view of the role of economic sanctions in defining when last resort applies.

In the first place, economic sanctions may not be an appropriate means to accomplish the end in view. While they may be appropriate to address economic wrongs, they may not be adequate to rectify non-economic injustices. People deprived of their property by aggression can ultimately be compensated economically, while people deprived of their lives or liberty cannot. The key factor involved is the long time periods usually required for economic sanctions to have enough of a negative effect on the aggressor nation to cause it to capitulate. Additionally, the difficulty of enforcement may reduce their effectiveness even further and in instances where the aggressor nation has a highly authoritarian form of political leadership that is not responsive to its people, the suffering such sanctions bring upon the general populace may not have any effect on the leadership's political decision-making. The main requirement for the viability of economic sanctions as an alternative to war, from a just war perspective, is whether such

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[81] This argument was debated extensively, for example, as part of the just war dialogue which went on in advance of the beginning of the coalition counteroffensive during the Gulf War. For discussion of the ethical issues involved with the use of economic sanctions, see: Lori Damrosch, "The Civilian Impact of Economic Sanctions", in Lori Damrosch, ed., Enforcing Restraint, New York: Council on Foreign Relations, 1993, pgs 274-315

sanctions have a significantly high probability of resolving the conflict.[82]

2. JUS IN BELLO: PROPER CONDUCT IN WAR

A. Proportionality of Means:

The principle of proportionality in jus in bello is similar to the same criterion in the jus ad bellum in that both are calculative estimates of the proportion between good and evil resultant upon certain ends. The main difference between them is in the ends to which they refer. Where proportionality in the jus ad bellum is concerned that the overall good to be achieved by the conflict is proportionate to the total evil produced, the same principle in jus in bello is restricted to the proportionality of the specific military means that are used to achieve these ends. While the question of ultimate ends is proper to the criterion in jus ad bellum, its relation to the same criterion in jus in bello is more problematic if the ultimate ends of the war are taken as the sole referent for determining the proportionality of its means. Simply put, is the proportionality of military means determined by the specific military objectives that those means are intended to achieve, or by the overall and ultimate objectives of the war itself?

While it is clear that at one level, the ultimate justification for the means allowed in war must be found in the just cause that legitimates the war's ends to begin with, as William O'Brien has

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[82] Regan, pgs 64-66

shown, there are several problems with making these ends the sole reference by which proportionality is determined within the jus in bello. Making the ultimate ends of the war the sole justification for specific means used in its prosecution makes it very difficult to judge either the proportionality or the morality of these means. A specific military means may be either proportionate or disproportionate to its immediate objective, regardless of the ultimate ends of the war. Historically, this was precisely the issue that was at the root of many questions regarding command responsibility for war crimes during the Nuremberg trials following World War II. It had been argued at Nuremberg that all military means used by the German forces were ipso facto war crimes because they had been used for the purpose of an unjust, aggresive war. Because the ultimate ends of such war were immoral, all means used in pursuit of such ends were disproportionate and therefore, immoral. This view was rejected, and the legitimacy of specific German military actions was judged not on the basis of the overall ends of the German political agenda, but rather on the basis of their proportionality to the specific military objectives they were related to.[83]

Proportionality of means, then, has a double reference to both the immediate and the ultimate ends of military actions. Military means must be proportionate to specific, legitimate military ends and also proportionate to the just cause ends of the overall war effort.

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[83] O'Brien, The Conduct of Just and Limited War, pgs 38-40

Determining which reference should be applied to any given means in warfare will depend on the relation of the means to the overall scope of the conflict. MIlitary means, then, must be assessed in terms of their proportionality depending upon whether they are utilized at the tactical or the strategic level of warfare. Tactical means should be judged for their proportionality in terms of their relation to specific tactical ends. Strategic means find their reference for proportionality in the just cause ends of the war.

While the tactical and strategic levels of proportionality in jus in bello are discreet, they nevertheless share some degree of overlap and mutual interaction upon one another. Cumulative tactical decisions may have an impact on the overall strategic plan of a war that will affect calculations of the jus ad bellum proportionality and impact on the overall just cause of the war. Likewise, strategic decisions have obvious implications for the alternatives that are available for conducting tactical operations.[84]

The "calculus" of proportionality, then, is related principally to the legitimate military goals to be accomplished. At its most basic level of opposing force with similar or proportionate military means, it involves a weighing and consideration of enemy forces and assets and the least destructive ways of overcoming them in order to achieve those goals. As with proportionality of ends, the good to be achieved by any military means must be proportionate to the evil produce by those means. It is in this "moral calculus", as with proportionality in the jus ad bellum, that the greatest problem with

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84 Ibid., pgs 40-41

the proportionality of means occurs. Michael Waltzer points out the fact that "there is no ready way to establish an independent or stable view of the values against which the destruction of war is to be measured."[85]

Proportionality is a totally situationally-based concept, and what may be a militarily proportionate means in one tactical context may not be in another, and so the requirements of proportionality are very difficult to universalize. Different modern just war theorists have tried to articulate standards for determining proportionality of means in different ways, none of which can be considered to be completely successful.

Paul Ramsey, for example argues that the basic idea of proportionality derives from the agape principle of Christian love for the neighbor. The Christian may not act towards the neighbor, even the enemy, with unrestrained force, but rather must be motivated by "love transforming justice" so that only the minimum level of force needed to deter the enemy may be used.[86]

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[85] Waltzer, pg 129

[86] Within Christian ethics a further limitation on the legitimate use of force can be found in the Old Testament biblical principle of the lex talionis (Exodus 21:23-25, Leviticus 24:19-20, Deuteronomy 19:21). The principle of "eye for eye, tooth for tooth, life for life" was never intended as a justification for individual retribution, but rather was a standard by which the civil magistrate was to be guided in determining that the restitution matched the loss involved in the commission of a crime. The intention of the law was to make restitution not to allow for retaliation or vendetta. Therefore the level of restitution demanded was to be directly equivalent to the loss, but neither less or more exacting. The principle establishes as well the concept that the legitimate use of force in the retributive justice of the state is to be directly proportionate to the force which it is intended to offset. See: Walter Kaiser, Toward Old Testament Ethics, Grand Rapids: Zondervan, 1991, pgs 72-73, 104-105, 171-172, 299-301

Proportionality, then, must be based on best estimates of the enemy's capabilities and probable courses of action.[87] The weakness of this position is that it leaves the determination of proportionality dependent upon hypothetical probabilities. Decisions based on faulty assumptions, bad information or probabilities that do not eventuate may lead to the use of military means that are patently disproportionate to the threat and therefore immoral.

William O'Brien, on the other hand suggests that proportionality of means is best determined on the basis of the normative principle of "reasonableness." Borrowing from domestic law practice, in which legal norms can be extrapolated from the behavior of a hypothetical "reasonable man" to all citizens, O'Brien suggests that the military equivalent would be the construct of the "reasonable commander" based upon the currently accepted military practice and experience. As O'Brien himself points out, however, the lack of authoritative decisions makes it very difficult to establish universal standards of reasonableness.

> "In a domestic public order...the legislature and the courts set standards for reasonable behavior. While the standards have supporting rationales, their greatest strength lies in the fact that they are laid down by authority and must be obeyed. With the very rare exception of some of the post-World War II war crimes cases, authoritative standards for belligerent conduct are found primarily in general conventional and customary international law prescriptions. These international law norms are often too general to provide

87 Ramsey, War and the Christian Conscience, pg 39 ff; cited in Johnson, Just War Tradition , pg 198

> the specific characterizations of proportionate and disproportionate behavior that regularly issue from domestic law in the form of reasonable man/reasonable conduct cases."[88]

While proportionality as a modern just war principle is crucial to a functional jus in bello, it does pose challenges for the practical application of the principle to specific tactical situations.

B. Discrimination:

The criterion of discrimination is most simply expressed in the principle of noncombatant immunity in war. As a fundamental principle of modern just war theory, the idea that noncombatants are to be considered immune from direct intentional attack has also come to be a recognized principle of international law. Noncombatants are distinguished from combatants in war by the fact that they have no direct material or formal participation in the use of force. Military means which cannot discriminate between combatants and noncombatants are morally impermissible. On the other hand, military means that are directed at legitimate military objectives are morally permissible even if noncombatants are inadvertently place at risk. Under these circumstances, the foreseen but unintentional deaths of noncombatants which occur as the indirect secondary effects of attacks upon legitimate military objectives are not considered to be violations of the criterion of discrimination on the basis of the moral principle of double

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[88] O'Brien, The Conduct of Just and Limited War, pg 41

effect.[89]

The principle of double effect is a construct of moral theology which allows that an actor may not be held morally responsible for the evil consequences of his actions as long as the following conditions are met:

> "(1) The act is good in itself or at least indifferent, which means for our purposes, that it is a legitimate act of war. (2) The direct effect is morally acceptable - the destruction of military supplies, for example, or the killing of enemy soldiers. (3) The intention of the actor is good, that is, he aims only at the accepted effect; the evil effect is not one of his ends, nor is it a means to his ends. (4) The good effect is sufficiently good to compensate for allowing the evil effect; it must be justifiable ...(by the) proportionality rule."[90]

As was noted above, within just war theory the same moral economy which justifies the taking of life also provides the limitation upon which lives can legitimately be taken. The prima facie obligation not to kill, when overridden by the criteria of the

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[89] Johnson, Just War Tradition and the Restraint of War, pgs 196-199; Johnson and Weigel, pgs 31-32; Walzer, pgs 138-144, 151-160; Bailey, pgs 79-82; Hartigan, pgs 204-207; See also: Lester Nurick, "The Distinction Between Combatant and Noncombatant in the Law of War", American Journal of International Law 39: 680-697, 1945; Frits Kalshoven, "Civilian Immunity and the Principle of Distinction", American University Law Review 31: 855-859, 1982; Robert Phillips, "Combatancy, Noncombatancy, and Noncombatant Immunity in Just War Tradition", in James T. Johnson and John Kelsay, eds., Cross, Crescent, and Sword, New York: Greenwood Press, 1990; George Wright, "Noncombatant Immunity: A Case Study in the Relation Between International Law and Morality", Notre Dame Law Review 67:335-361, 1991

[90] Walzer, pg 153

jus ad bellum, also imposes a similar prima facie duty to distinguish between the innocent and the guilty in the taking of human life. Within modern just war theory, "innocence" and "guilt" are understood not in terms of the subjective moral responsibility of agents in relation to the act of war, but only in terms of the degree of their participation in it. Noncombatants, then, are innocent and immune from attack so long as they are not participating formally and materially in the conduct of the war, whereas combatants who do so participate are formally guilty and so subject to attack.

Within the modern revival of just war theory in the post-World War II era, the principle of discrimination has been one of the most widely contested and debated criterion in terms of its continued applicability and relevance in the face of modern warfare. Some of the specific issues involved will be considered below in the analysis of O'Brien's and Ramsey's positions on noncombatant immunity.

3. MILITARY NECESSITY:

Nowhere is the conflict of interest between modern just war theory and modern warfare seen more clearly than in the uneasy relationship between the jus in bello criteria of proportionality and discrimination and the realist principle of military necessity. Such conflict would seem to be axiomatic, given the seemingly contrary nature of these two principles. The former seek to place limits and moral boundaries upon the means to the just ends of war, the latter when taken as a justification for a policy of politico-military realism, seeks to override these limitations on the basis of the

utilitarian axiom that the ends of war justify its necessary means.

In the strictly military sense in which the term is used, military necessity refers to the empirical fact that in any given situation in which the use of military force is called for, there are certain actions which need to be taken in order to resolve the situation in a way that contributes to the accomplishment of stated military objectives intended to achieve both specific military goals and ultimate victory in the conflict. What specific actions should be taken, as posed by the various solutions to the problem, will vary under the circumstances as will the degree of objective necessity (as opposed to mere preference or convenience) actually present. All of these possible actions in their various circumstances are commonly referred to by military professionals as involving the principle of military necessity.

> "As such it (military necessity) means the appreciation of a specific situation from the military point of view, usually accompanied by an indication as to what measures are considered necessary to deal with that situation....Since the concept of military necessity, however expressed, is basic to all military operations, it clearly assumes a central position in any system of rules regulating the conduct of war. The question that immediately comes to mind is, 'What happens when military necessity as conceived by the military commander conflicts with a rule of international law?' The answer to this question determines the effectiveness of the law of war."[91]

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[91] William O'Brien, "The Meaning of MIlitary Necessity in International Law", World Polity 1: 109-176, 1957, pg 117

While the jus in bello is essentially a moral framework for governing the conduct of war, it finds proscriptive force in its embodiment in modern international law as the "law of war."[92] In modern formulations of the law of war, the principle of military necessity is circumscribed by the principles of proportionality and discrimination. Historically, however, this has not always been the case. There have been two main theories of military necessity recognized in international law which have conflicted at times. The "unlimited theory" of military necessity, commonly referred to as the "Kriegsraison" theory, was developed primarily by German theorists in the late nineteenth and early twentieth centuries. The Kriegsraison theory took the view that military necessity takes precedence over the mere custom or manner of waging war (Kriegsmanier). In the Kreigsraison view, military custom or the law of war becomes only a relative restraint over the conduct of war and military necessity is seen as an absolute principle of military realism which confers the right to ignore such restraint on the basis of the demands of military utility.[93]

Opposed to the Kriegsraison view was the "limited theory"

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92 "Law of War" as understood in this study refers to those international conventions and treaties regulating the conduct of land warfare as recognized by the United States as well as the unwritten customary law established by the custom of nations and recognized by authorities in international law. See: Department of the Army, Field Manual (FM) 27-10: The Law of Land Warfare, July 1956, pg 4; International and Operational Law Department, Operational Law Handbook, Charlottesville, Virginia: U.S. Army Judge Advocates General's School, 1995, Ch 18; Morris Greenspan, The Modern Law of Land Warfare, Berkley: University of California Press, 1959

93 Ibid., pgs 118-120

formulated by the American theorist Francis Leiber initially to regulate the conduct of Union forces during the American Civil War and later codified in the principles of international law laid down by the Hague Conferences of 1899 and 1907. The limited theory of military necessity regards the principle as a relative one bounded by the restrictions of the law of war. Leiber, who was the first war theorist to prepare a field manual which included a systematized exposition of the laws of war also was the first to define the principle of military necessity in the form which is currently recognized almost universally. In this definition, military necessity plays a positive role supportive of the law of war.

> "Military necessity, as understood by modern civilized nations consists in the necessity of those measures which are indispensable for securing the ends of the war, and which are lawful according to the modern law and usages of war."[94]

At the time Leiber formulated his theory, it was a generally accepted basic principle of war that the means necessary to the ends of war were by and large permitted and limited only by the principle of military utility that the means must not exceed the ends[95] Theorists who advocated a claim of necessity as a

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[94] U.S. War Department, 'Instructions for the Government of Armies of the United States in the Field, General Orders 100', Article 14, cited in Ibid., pg 128

[95] The principle of military utility in international law is, in essence, a statement of the jus in bello principle of proportionality: the evil done by military action must not outweigh the good it seeks to accomplish.

legitimate reason to exceed the customs of war did so on the basis of the belief that the laws of war were themselves an exception to the basic principle of war. In effect, they advocated a double standard which allowed that war could be controlled by laws as long as the belligerents believed that not too much was at stake, but in the event that some vital interest dictated, a belligerent could override the laws of war and revert back to the original principle. Over against this, Leiber argued that the rules governing warfare in a "civilized society" had become intrinsic to the very nature of such warfare by custom, practice and historical precedent. For a civilized state, the only concept of war that was morally and legally legitimate was one which was conducted according to such recognized and binding rules. Reverting back to an earlier concept of war freed from civilized restrictions on the claim of necessity is morally and legally illegitimate.[96]

> "Under the Lieber doctrine there is no question of reversion to an earlier type of warfare simply because of necessity. If a rule is clear-cut and contains no provisions for exceptions, it must be obeyed. The only legitimate 'military necessity' is, therefore, that military necessity defined in and limited by the laws of war....It is this use of the term 'military necessity' which transforms it into a 'principle' of the law of war instead of a purely factual statement of military utility which is often in opposition to the law.[97]

The establishment and general acceptance of the Hague

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96 O'Brien, "The Meaning of Military Necessity in International Law", pgs 128-130

97 Ibid., pg 130

Conventions in 1899 and 1907 created the legal foundation in international law for the modern concept of military necessity in several ways. Article 22 of the Hague Conventions on the Rules of Land Warfare stated that "The right of belligerents to adopt means of injuring the enemy is not unlimited." This resolution effectively eliminates the argument that military necessity can legitimize the use of any and all military means deemed necessary if the ends are considered important enough. Secondly, the principle of military necessity was actually taken into account in the formulation of the conventions and many of their articles are explicitly qualified and made conditional upon the requirements of military necessity. While this distinction between absolute and conditional rules of war has been criticized for allowing too much leeway to determinations of necessity in actual conflicts, it has had the effect of limiting the use of military necessity as a rationale for entirely obviating the laws of war.[98]

One of the important legal precedents established by the Nuremberg War Crimes Tribunal following World War II was that the plea of military necessity was not an allowable defense for violations of international law in war crimes cases. Decisions by the United States Supreme Court and American military tribunals have also upheld this principle. Where positive laws of war contain absolute prohibitions against certain actions (such as Article 23 of the Hague Conventions which prohibits the use of poison or poisoned weapons, the treacherous killing or wounding of enemy soldiers, the

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[98] Ibid., pgs 130-131; see also: Greenspan, pgs 313-315

killing of soldiers who have surrendered, the refusal to grant quarter or Article 3 of the Geneva Conventions which prohibits the murder of noncombatants) no argument of military necessity is legally possible.[99] This view of military necessity as circumscribed by the laws of war forms the basic understanding of the principle within current military doctrine of the armed forces of the United States:

> "The law of war places limits on the exercise of a belligerent's power in the interests mentioned in paragraph 2 and requires that belligerents refrain from employing any kind or degree of violence that is not actually necessary for military purposes and that they conduct hostilities with regard for the principles of humanity and chivalry. The prohibitory effect of the law of war is not minimized by "military necessity" which has been defined as that principle which justifies those measures not forbidden by international law which are indispensable for securing the complete submission of the enemy as soon as possible. Military necessity has generally been rejected as a defense for acts forbidden by the customary and conventional laws of war inasmuch as the latter have been developed and framed with consideration for the concept of military necessity."[100]

Given that the principle of military necessity as understood in international law is not considered to be incompatible with those

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99 William Downey, "The Law of War and Military Necessity", American Journal of International Law 47:251-262, 1953, pg 262; see also: N.C.H. Dunbar, "Military Necessity in War Crimes Trials", British Yearbook of International Law 29:442-452, 1952

100 FM 27-10: The Law of Land Warfare, pgs 3-4

principles that place limits upon it, how is it that modern just war theorists and international jurists alike repeatedly cite the problem that military necessity poses for the observance of the moral criteria of proportionality and discrimination which underlies the positive statements of international law?[101] The answer, in part, is found in the nature of modern warfare. As William O'Brien has pointed out with regard to the Hague Conventions and their obvious limitations in addressing the nature of the "total warfare" characteristic of war since World War I: "The doctrine that military necessity is limited by the laws of war became less important as the laws of war were revealed to be inadequate."[102] The combined factors of industrialized societies in which the whole nation's economy is involved in the "war effort" thus blurring the distinction between combatants and noncombatants; the highly destructive capacity of modern weapons technology, particularly that of nuclear weapons, and the resultant difficulty in maintaining the principle of discrimination in the use of weapons; and the modern ideological

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101 See, for example: O'Brien, "The Meaning of Military Necessity in International Law", pgs 174-176; O'Brien, "Legitimate Military Necessity in Nuclear War", World Polity 2:35-120, 1960, pgs 83-85; O'Brien, The Conduct of Just and Limited War, pgs 49-55, 67; Robert Tucker, The Just War, Baltimore: Johns Hopkins Press, 1960, pg 86; Osgood and Tucker, pgs 197-213; Walzer, pg 146; Michael Akehurst, A Modern Introduction to International Law (Fifth edition), London: George, Allen and Unwin, 1984, pg 228-232; Richard Miller, The Law of War, Lexington, Massachusetts: Lexington Books, 1975, pg 273-311; Donald Wells, War Crimes and Laws of War (Second edition), Lanham, Maryland: University Press of America, 1991, pgs 63-85; Yehuda Melzer, Concepts of Just War, Leyden, Netherlands: A.W. Sijthojj, 1975, pgs 88-93, 110

102 O'Brien, "The Meaning of Military Necessity in International Law", pg 131

character of war as a conflict demanding the complete and "unconditional surrender" of the enemy all have contributed to this situation.

Of particular concern in this modern war context is the extent to which claims of military necessity have been used to set aside the jus in bello principle of discrimination and justify the violation of noncombatant immunity. As Robert Tucker has pointed out in this regard, even given the restraining sanctions of international law, the nature of modern warfare has so eclipsed the restraints they provide, that what may be prohibited in principle is often functionally irrelevant to what is actually done in practice.

> "The same need for justification that prompts men to endow these purposes with an absolute significance may in turn make of military necessity a principle that justifies almost any behavior in war, however one-sided its consequences. For this reason alone the profession of humanitarian aspirations may provide little indication of the concrete measures men will nevertheless be willing to take in war. The appeal to humanity may have a moderating effect when its expression does not run athwart what are conceived to be the requirements of military necessity. But how men conceive of these requirements will in turn largely depend upon the nature of the interests for which they fight....In practice, therefore, if not in principle, humanity in war is largely a function of military necessity; an expansion of the later will have as its consequence a contraction of the former."[103]

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[103] Osgood and Tucker, pg 204

We turn our attention, then, to examine several cases where this conflict between military necessity and noncombatant immunity has been seen historically in warfare.

III. THE ETHICAL TENSION BETWEEN DISCRIMINATION AND NECESSITY

The ethical conflict between modern just war theory, as it is embodied in the jus in bello principle of discrimination and in international law, and the principle of military necessity, as recognized both in international law and military theory, has been present to a greater or lesser degree in all modern wars. In this study we will examine briefly several specific instances of this ethical conflict as it has arisen in three different types of warfare: the "total war" of World War II; the "counterinsurgency warfare" of the Vietnam War; and the "High Tech" conventional warfare of the Persian Gulf War. Our purpose is not to examine these cases exhaustively, but only as they are illustrative of the manner in which military necessity and discrimination can come into conflict in the actual conduct of military operations at the strategic and tactical levels.

Consideration will be given primarily to analysis of actions by the armed forces of the United States and its allies with only incidental reference to the actions of hostile forces. This is strictly a methodological limitation mainly due to the topical constraints of this study and does not imply in any way that the same or even more serious ethical conflicts were not involved in the actions of the opposing forces involved in these wars.[104] My focus

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[104] Clearly, for example, the ethical conflict posed by the Allied practice of bombing civilian targets, which was also practiced by the Germans, pales in comparison with the gross immoralities of the Holocaust or the Japanese abuse of civilians and prisoners of

here will not be on making judgements as to the correctness of overall United States government policy or military doctrine in these instances, but only in examining them to show the manner in which this ethical conflict has taken place in the actual conduct of hostilities. Consequently no analysis of the jus ad bellum "just cause" of these conflicts will be undertaken here.[105]

In each case we will examine if and how the principle of noncombatant immunity was compromised by the nature of modern warfare, and then consider how arguments of military necessity served to justify overriding this principle. Finally, consideration will not be given to all possible instances of conflict between noncombatant immunity and military necessity in each of the wars studied, but only to those examples which are considered to be extensive and grave enough as to raise legitimate concerns as to whether the just cause ends of the war were in some way rendered suspect by the overall conduct of the war.

1. WORLD WAR II: TOTAL WAR

A. Conventional Countervalue Bombing of Cities:

The conventional bombing attacks by U.S. and allied forces against both German and Japanese cities have been cited by just war

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war. Space limitations and the topical interest of this study simply prevent an adequate treatment of these issues here.

105 Nevertheless, it is this writer's view that in each case examined, the U.S. position in the war was justified and met all the criteria of the jus ad bellum. For detailed analysis of the jus ad bellum of these cases, see: O'Brien, The Conduct of Just and Limited War, pgs 71-126; Johnson and Weigel, Just War and the Gulf War, pgs 20-31

analysts as a clear example of the violation of both the jus in bello principles of proportion and discrimination.[106] The raids were responsible for extensive death, injury and social disruption of large numbers of noncombatants.[107] While the raids were directed, in part, at the destruction of legitimate military objectives, they were also intended for the disruption of the industrial production capacity that supported the war effort of the enemy by the general destruction of the society in which this production took place. Additionally, the element of reprisal and revenge was a strong justifying factor in the bombing campaigns against Germany,

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[106] See: John Ford, "The Morality of Obliteration Bombing", Theological Studies 5:261-309, 1944; Walzer, pgs 255-268; O'Brien, The Conduct of Just and Limited War, pgs 71-87; Ramsey, War and the Christian Conscience, pgs 60-73. For general historiography of World War II air warfare and strategic bombing policy, see: John Keegan, The Battle for History: Re-fighting World War II, New York: Vintage Books, 1996; Kenneth Werreil, Blankets of Fire: U.S. Bombers over Japan during World War II, Washington, D.C.: Smithsonian Institute Press, 1996; Walter Boyne, Clash of Wings: Air Power in World War II, New York: Simon and Schuster, 1994; Conrad Crane, Bombs, Cities and Civilians: American Airpower Strategy in World War II, Lawrence, Kansas: University Press of Kansas, 1993; E. Bartlett Kerr, Flames Over Tokyo: The U.S. Army Air Forces incendiary campaign against Japan, 1944-45, New York: D.I. Fine, 1991; R.J. Overy, The Air War, 1939-1945, New York: Stein and Day, 1980; David MacIsaac, Strategic Bombing in World War II: the Story of the United States Strategic Bombing Survey, New York: Garland Publishing , 1976; Larry Bidinian, The Combined Allied Bombing Offensive Against the German Civilian, 1942-1945, Lawrence, Kansas: Coronado Press, 1976; U. S. Army Air Force, Air War: Official Report of the Commanding General of the Army Air Forces to the Secretary of War, January 4, 1944, Washington, D.C.: United States News, 1944;

[107] By some estimates, the total number of civilian casualties due to aerial bombardment on all sides during the war reached a staggering figure of twelve million people. See: Howard Levie, When Battle Rages How Can Law Protect?, 1971, pgs 24, 70; cited in Judith Gardam, "Noncombatant Immunity and the Gulf Conflict", Virginia Journal of International Law 32:813-836, 1992, pg 821

especially by the British, although the policy was continued until the end of the war when the claim of reprisal was no longer applicable to Germany. Finally, the bombing was justified on the basis of the need to destroy the morale of the civilian population which, it was argued, would undermine support for the war effort and lead to its earlier conclusion. All of these effects were justified, on the basis of military necessity, as being important strategic considerations that were vital to the overall conduct of the war.[108]

The strategic policy of saturation bombing of cities lead to massive bombing campaigns against major German cities like Lubek and Essen in the heavily industrialized areas of the Ruhr Valley as well as major campaigns against large population centers like Berlin and Hamburg. In Hamburg alone, over 40,000 people were killed and 1,000,000 made homeless during the Allied bombing campaign of July - November 1943. Incendiary bombing, which had been initially developed by the Germans, was used against the German city of Dresden, but was more commonly used, with devastating effects, in the Pacific theater against Japan where high level daylight precision bombing was generally ineffective against Japan's industrial centers. The first of such attacks on Tokyo conducted in March 1945, destroyed twenty-five percent of the city and killed more than 80,000. Fire-storm bombing was used against major Japanese cities such as Nagoya, Osaka, Kobe, Yokohama, and Toyama. On the

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[108] Michael Walzer points out, however, that this opinion was not unanimous among military officers, and that in the discussion of strategic policy and even at the height of the "blitz", there was dissent by many British officers about the policy of targeting civilians. see: Walzer, pg 257

basis of these actions, legitimate questions can be raised as to whether the collateral destruction done to noncombatants was disproportionate to the military advantage gained, and to what extent the military necessity of these tactics legitimized direct intentional attacks against noncombatants.[109]

While U.S. policy during the bombing campaigns stated a preference for daylight precision bombing, as opposed to the British practice of nighttime area bombing necessitated by the lack of the more advanced bombsight systems the Americans had, out of a stated concern to avoid noncombatant deaths, nevertheless both allies participated in the other's raids. Secondly, because of the technological limitations of the time, the accuracy of even "precision" bombing created a substantial margin of error productive of significant civilian damage even in raids against legitimate military targets. In the practice of fire-storm bombing conducted over cities like Dresden and Tokyo, concerns to minimize the deaths of noncombatants were clearly inoperative. While bombing military targets in cities necessarily caused unavoidable collateral damage, the deliberate firebombing of cities can hardly be categorized as collateral damage incidental to the destruction of military targets.[110]

Allied bombing of German and Japanese cities, then, can be

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[109] O'Brien, The Conduct of Just and Limited War, pgs 79-81; Encyclopaedia Britannica, "World War II", Vol 29:987-1029, New York: Encyclopaedia Britannica, 1997, pgs 1008, 1017, 1021

[110] Ibid., pgs 81-82

categorized into three different types: precision bombing of legitimate military targets with significant collateral damage due to technological limitations; area bombing with even greater collateral damage due both to technological limitation and the expansion of the target area; and fire-storm bombing in which the destruction of military targets was in effect the collateral damage resultant upon the intentional destruction of an entire metropolitan area. When analyzed on the basis of the principle of discrimination, the first of these would be morally licit on the basis of the principle of double effect, in that only military targets were directly targeted and noncombatant deaths, even though extensive, were an unintended secondary effect. Area bombing, in addition to causing civilian damage grossly disproportionate to the destruction of military targets, would generally have to be considered indiscriminate as well even when assisted by the principle of double effect.[111] Fire-storm bombing would clearly be an example of the direct violation of the principle of discrimination with no double-effect mitigation possible, because the intention of the act was aimed at the direct intentional killing of noncombatants.[112]

On the basis of the fact that area bombing and later fire-storm bombing constituted the majority of the allied strategic bombing

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[111] A military study conducted in 1941, for example, showed that on a typical mission only one third of the attacking planes dropped their ordinance within five miles of the intended target. Walzer points out that once this fact was known, it would seem to be impossible to claim that the collateral damage caused by area bombing could be considered an unintended consequence of an actual attack on a legitimate target. See: Noble Frankland, Bomber Offensive: The Devastation of Europe, New York: 1970, pgs 38-39, cited in Walzer, pg 258

[112] O'Brien, The Conduct of Just and Limited War, pgs 82-83

campaigns during the war, it is clear that the claim of military necessity that justified these practices was used in a way that plainly overrode the jus in bello principle of discrimination. Beyond the immediate effects of this violation of noncombatant immunity it is important to observe that the long term effect of this ethical conflict was the virtual destruction of the principle of discrimination as an effective prescription of the international law of war which has had a continuing impact up to the present day. As O'Brien points out, this suggestion is supported by the fact that there was no serious prosecution by the Allies for the German bombing of civilians at the Nuremberg trials, since as the Allies themselves had used the same tactics.[113]

B. Nuclear Attacks on Japan:

The dropping of the world's first nuclear weapons on the Japanese cities of Hiroshima and Nagasaki[114] raised the relation

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[113] Ibid., pg 84

[114] For general historical background on the atomic bombing of Japan, see: Michael Hogan, ed., Hiroshima in History and Memory, New York: Cambridge University Press, 1996; Richard Minear, ed., Hiroshima: Three Witnesses, Princeton: Princeton University Press, 1990; Kyoko Solden and Mark Solden, The Atomic Bomb: Voices from Hiroshima and Nagasaki, Armonk, New York: M.E. Sharpe, 1989; John Hershey, Hiroshima, New York: A.A. Knopf/Random House, 1985; Peter Wyden, Day One: Before Hiroshima and After, New York: Simon and Schuster, 1984. For discussion on the decision to use nuclear weapons against Japan, see: Gar Alperovitz, The Decision to use the Atomic Bomb and the Architecture of an American Myth, New York: A.A. Knopf, 1995; Ronald Takaki, Hiroshima: Why America Dropped the Atomic Bomb, Boston: Little, Brown and Co., 1995; Robert Newman, Truman and the Hiroshima Cult, East Lansing, Michigan: Michigan State University Press, 1995; Robert Maddox, Weapons for Victory, the Hiroshima Decision Fifty Years Later, Columbia, Missouri: University

between military necessity and the principle of discrimination to an entirely new level of ethical conflict. The primary rationale for using these new weapons at the time was based on an argument of military necessity. It was believed that their use would force the Japanese to surrender, and that this would obviate the need for an invasion of the Japanese home islands which it was believed would be extremely costly. Estimates of Allied casualties from an invasion ranged into the hundreds of thousands. The final defense of their homeland by the Japanese military and the expected resistance by the civilian population to an invasion were expected to result in enormous loss of life of both combatants and noncombatants and the widespread destruction of Japanese society. The claim of military necessity for the use of the bombs, then, was based on the argument of proportionality in terms of military utility: the damage inflicted by the atom bomb was considered proportionate to the losses that would have occurred on both sides in an invasion by conventional forces.

While military necessity can perhaps be reconciled with the jus in bello principle of proportionality in this case, it is difficult to see how its conflict with the principle of discrimination can be avoided. The extent of the direct, intentional destruction of noncombatants and nonmilitary targets effected by the attacks on Hiroshima and Nagasaki were unparalleled. While both cities did

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of Missouri Press, 1995; Dan Kurzman, Day of the Bomb: Countdown to Hiroshima, New York: McGraw Hill, 1986; Ian Clark, Nuclear Past, Nuclear Present: Hiroshima, Nagasaki, and Contemporary Strategy, Boulder, Colorado: Westview Press, 1985

contain combatants and legitimate military objectives, the vast majority of those killed outweighed these by several orders of magnitude. As with the conventional practice of fire-bombing cities, it is difficult to escape the conclusion that the destruction of military targets was the purely incidental and collateral damage resulting as a secondary consequence of the intentional, direct destruction of entire cities. Any thought of double effect is removed from the moral calculus of this situation and so it is impossible to reconcile this with the principle of discrimination.[115]

2. VIETNAM: COUNTERINSURGENCY WARFARE

A. Use of Firepower:

The difficulties of applying the traditional categories of the jus in bello to counterrevolutionary war are especially acute with reference to the principle of discrimination.[116] In a guerilla war, the combatants may be indistinguishable from noncombatants.

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115 O'Brien, The Conduct of Just and Limited War, pgs 84-86; see also: John Ford, "The Hydrogen Bombing of Cities", in, William Nagle, ed., Morality and Modern Warfare, Baltimore: Helicon, 1960, pg 101-102

116 For treatment of the political and strategic constraints involved in waging counterinsurgent warfare as a form of "limited war" and their impact on the conflict in Vietnam, see: O'Brien, The Conduct of Just and Limited Wars, pgs 257-276. For a thorough treatment of the general problem of the application of jus in bello principles to counterinsurgent warfare, see: Paul Ramsey, The Just War, New York: Scribner's, 1968, pgs 427-536; William O'Brien, "The Jus in Bello in Revolutionary War and Counterinsurgency", Virginia Journal of International Law 18:193-242, 1978; On the specific problems that guerilla warfare poses for the jus in bello principle of discrimination, see: Judith Gardam, "Noncombatant Immunity and the Gulf War", Virginia Journal of International Law 32:813-836, 1992

Among the many tactics insurgents use is to try and provoke attacks by the counterinsurgent forces which will directly jeopardize the lives of noncombatants. The fear and resentment produced towards the counterinsurgent forces serves as a way of creating popular support for the insurgent cause. This effect was clearly seen in the conduct of the war in Vietnam. Not only did the communist forces use the population as a "human shield" for their attacks in many cases, but often used noncombatants directly to conduct terrorist attacks against U.S. forces.[117]

From the perspective of jus in bello, the principle problem with U.S. military action in Vietnam was the use of excessive firepower in populated areas which produced heavy casualties among noncombatants, widespread destruction of civilian property and numerous refugees. The combination of the vastly superior military capabilities of U.S. forces, the communist insurgent's tactic of fighting from within inhabited areas and using the civilian population as a shield, and the standard U.S. military practice of responding to hostile fire with overwhelming combat power in order

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[117] For general historical background on the Vietnam War, see: Edwin Moise, Tonkin Gulf and the Escalation of the Vietnam War, Chapel Hill: University of North Carolina Pres, 1996; George Moss, Vietnam, an American Ordeal, Englewood Cliffs, New Jersey: Prentice Hall, 1990; Maurice Isserman, The Vietnam War, New York: Facts on File, 1992; Lloyd Matthews and Dale Brown, eds., Assessing the Vietnam War: a Collection from the Journal of the U.S. Army War College, McClean, Virginia: Pergemon-Bressey's International Defense Publishers, 1987; Gabriel Kolko, Anatomy of a War: Vietnam, The United States, and the Modern Historical Experience, New York: Pantheon , 1985; Stanley Karnow, Vietnam: A History, New York: Viking Press, 1983; Harry Summers, On Strategy: the Vietnam War in Context, Carlisle Barracks, Pennsylvania: Strategic Studies Institute, U.S. Army War College, 1981

to minimize U.S. casualties all contributed to this problem.

Excessive use of firepower resulted in high civilian casualty rates in Vietnam as the result of several common tactical scenarios. Most commonly, U.S. or A.R.V.N. forces came under attack from insurgent forces hiding in populated villages or hamlets, returned fire, and in the ensuing firefight (during which the bulk of the insurgent forces would frequently break contact and slip away) much of the village would be destroyed and many of its noncombatant inhabitants killed. In many cases the use of massive firepower caused more collateral damage than combatant casualties. In instances where communist forces stood and fought pitched battles with U.S. and A.R.V.N forces in populated areas the devastation was often almost total. The archetypal statement of these tactics was undoubtedly the comment of an American officer about military operations to secure the town of Ben Tre during the communist's Tet Offensive of 1968: "We had to destroy the town in order to save it."[118]

The problem of violations of noncombatant immunity due to indiscriminate and massive use of firepower was a significant problem in Vietnam that was recognized by the military command structure.[119]

> "It is not necessary to do more than survey accounts of fighting in Vietnam to conclude that a very significant number of cases occurred in which firepower was grossly disproportionate to reasonable military

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118 Don Oberdorfer, Tet, New York: 1972, pg 202; cited in Walzer, pg 192

119 O'Brien, The Conduct of Just and Limited War, pgs 98-100

> necessity. Indeed, Military Assistance Command, Vietnam (MACV) directives warning against disproportionate reactions with firepower to minor attacks from hamlets and villages confirm that there was a major problem of over-reaction....MACV directives also acknowledged this problem by demanding greater efforts to avoid noncombatant casualties."[120]

The use of designated "free-fire" zones, and later in the war selective-strike zones from which civilians were supposed to be cleared, also resulted in numerous casualties. Once an area was declared clear, it was presumed that any observed activity in it was the result of enemy tactical or logistical operations and thus a legitimate target for attack. Often warnings to evacuate such areas were ineffective and civilians who were removed returned on their own because of the inadequacy of government resettlement efforts. While the effort to remove civilians from areas where enemy forces were operating was a legitimate tactic, and demonstrated a concern to protect noncombatants, much of the responsibility for the failure of these efforts must be laid on the South Vietnamese authorities who were often lax in enforcing the zone clearance policy. Tactical air strikes and artillery bombardments that were conducted over large areas with unobserved fire resulted in noncombatant casualties in areas which were supposed to be cleared of civilians.

While critics of the war have largely overstated the case as to the extent of U.S. forces violations of the principle of discrimination, and have failed to adequately consider the actions of

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120 Ibid., pg 100

the communist insurgents which fostered the pattern of fighting in populated areas, it is clear that the excessive use of firepower was a characteristic feature of U.S. military tactics during the war. As a general principle of military theory, the decision of a commander to respond to attack with overwhelming force based on a determination of military necessity in order to minimize his own casualties and conserve the combat power of his unit is a legitimate and prudent military judgement. The problem that such use of firepower presents in the context of counterinsurgent warfare where the enemy is intermingled with the population is that it is extremely difficult to use such power discriminately. Overall, in Vietnam the high numbers of noncombatant casualties would suggest that much of the use of firepower in Vietnam was "disproportionate, unjustified by military necessity, and indiscriminate."[121]

3. PERSIAN GULF WAR: "HIGH TECH" AIRLAND BATTLE

A. Infrastructure Degradation:

Throughout the Persian Gulf War the U.S. government and military emphasized repeatedly the intention to respect the principle of discrimination and to take all reasonable precautions to avoid causing noncombatant casualties.[122] Not surprisingly, there has been notable difference of opinion among commentators in the

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[121] Ibid., pg 101; see also: Walzer, pgs 188-196, on American rules of engagement in Vietnam and noncombatant casualties.

[122] U.S. Department of Defense, Conduct of the Persian Gulf War: An Interim Report to Congress, 1991, para. i-2, 1-4, 2-6, 2-7, 12-1 to 12-4

subsequent analysis of the success of the allied forces in accomplishing this task.[123] Somewhat predictably, such determinations appear to have as much to do with the author's overall view of the just cause of the war as with an objective analysis of its actual conduct.[124] One aspect of the war that has received a significant degree of consensus among many international law experts and just war theorists, though, has been the issue of the

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123 Casualty estimates for Iraqi noncombatants killed directly as a result of the air war vary widely from under 1000 to over 15000. Overall casualty figures for civilian deaths have been estimated as high as 90,000. The reliability of such casualty figures is extremely suspect, given that most of them are based on press statements of the Iraqi government which had clear propaganda motives for inflating statistics on civilian deaths during the war. On the problem of determining reliable casualty figures for both Iraqi combatants and non-combatants, see: John Heidenrich, "The Gulf War: How Many Iraqis Died?", Foreign Policy 90:108-125, 1993

124 On the view that noncombatant immunity was overly compromised, see: Alan Geyer and Barbara Green, Lines in the Sand: Justice and the Gulf War, Louisville, Kentucky: Westminster/John Knox Press, 1992; Gordon Zahn, "Ethics, Morality and the Gulf War", St John's Law Review 66:777-795, 1992; Stanley Hauerwas, "Whose Just War, Which Peace?", in, D.E. DeCosse, ed., But Was it Just?, New York: Doubleday, 1992. On the view that noncombatant immunity was not compromised, see: George Weigel, "From Last Resort to Endgame: Morality, the Gulf War, and the Peace Process, in , DeCosse, op.cit.; James T. Johnson and George Weigel, Just War and the Gulf War, Washington, D.C.: Ethics and Public Policy Center, 1991; William O'Brien, "Desert Storm: A Just War Analysis", St John's Law Review 66:797-823, 1992. For general historical background on the Gulf War, see: Hiro Dilip, Desert Shield to Desert Storm: the Second Gulf War, New York: Routledge, 1992; Michael Hazarr, Desert Storm: the Gulf War and What We Learned, Boulder: Westview Press, 1993; Norman Friedman, Desert Victory: the War for Kuwait, Annapolis, Maryland: Naval Institute Press, 1991; Michael Gordon, The General's War: the Inside Story of the Conflict in the Gulf, Boston: Little Brown, 1991; Benjamin Lambeth, Learning From the Persian Gulf War, Santa Monica, California: Rand, 1993; Harry Summers, On Strategy II: a Critical Analysis of the Gulf War, New York: Dell, 1992; Richard Hallion, Storm Over Iraq: Air Power and the Gulf War, Washington, D.C.: Smithsonian Institute Press, 1992

widespread destruction of the Iraqi material infrastructure as potentially violative of the principle of discrimination.

Although this tactic avoids targeting noncombatants directly, it has been argued that by destroying the technical and material resources necessary for a modern industrial society to function civilians are being intentionally attacked, albeit indirectly, because of their dependance on that infrastructure for life support. This has raised the issue of whether the emphasis in the modern jus in bello principle of discrimination on avoiding doing direct harm to noncombatants is adequate as a protective principle and whether it needs to be expanded in its scope. We will focus our attention in this argument on just one crucial element of this infrastructural damage that caused serious secondary effects throughout the rest of Iraqi society that were detrimental to the lives on noncombatants during and immediately following the war: the destruction of the Iraqi national electric power grid.

During the war the allies targeted the Iraqi electric grid as a "critical target set" and it was considered to be a key to degrading the effectiveness of vital "strategic centers of gravity" within the Iraqi government and military command structure. Aerial bombardment of national power grids has long been considered an important element of effective military campaigns because of its negative impact on military communication, command and control capabilities and war materiel production, as well as its secondary impact on political leadership and civilian morale. Targeting national electric capacity with aerospace power effectively

disrupts the enemy's "supporting infrastructure", one of the "Five Strategic Rings" necessary for a society to sustain its war effort.[125] The stated intention of the military planners in attacking the power grid was to cripple Iraqi air defense, communication, and command and control systems, all of which were legitimate military targets justified on the basis of military necessity. A secondary effect which was hoped for was the disruption of the political and military leadership that might lead to the downfall of Saddam Hussein's government. Reliable and effective electric power in Iraq was essentially terminated at the start of the "air war" on January 17th, and by the war's end it had been reduced to approximately 15 per cent of its prewar capability.[126]

The Iraqi power grid was an integrated system capable of rerouting electricity to some extent to make up for the lost capacity of damaged facilities. This necessitated disrupting the whole grid as opposed to just those portions which served strictly military

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[125] The strategic ring theory is a methodological concept developed by Colonel John Warden III, USAF (ret) for the comprehensive employment of aerospace power against a hostile force's war sustaining effort. Each of the different levels of societal support is viewed as a ring in an interdependent system which can be effectively degraded by the use of airpower. By attacking the enemy's political leadership, economic system, supporting infrastructure, population and military forces the capacity to sustain the war effort can be destroyed from the "inside out, using airpower to skip over military forces such as armies in the field to strike directly at state leadership." Significantly, in terms of the application of this theory, COL Warden was the Air Force's Deputy Director of Strategy, Doctrine and Plans during the Gulf War. See: COL John Warden III, USAF (ret), "The Enemy as a System", Airpower Journal, Spring 1995, pg 44, cited in CDR J.W. Crawford, USN, The Law of Noncombatant Immunity and the Targeting of National Electric Power Systems, Newport, R.I.: U.S. Navy War College, 1996, pg 1

[126] Crawford, pgs 1,12

facilities. In the attack on the system, most of the productive and transmission capacity of the overall grid was destroyed. The effect of shutting down most of the electricity for the civilian population in what was a modern, industrial society with a highly energy dependant mode of life was predictably severe. Without electricity for refrigeration and to run water pumps for irrigation-intensive agriculture and equipment for mechanized food production, the food shortages already produced by the U.N. embargo were made more severe. Water purification and sewage treatment facilities were effectively shut down without power to run machinery and pumping stations. In combination with a shortage of chemical supplies used to treat water caused by the bombing of Iraq's chemical production factories, this created a critical disruption in the supply of pure drinking water to virtually the entire population of all Iraq's cities. Effective sewage disposal was virtually eliminated in the cities without power to run sewage pumping stations. In many cases, untreated raw sewage flooded houses, pumping stations, and neighborhood streets.[127]

The water supply and sewage problems created serious public health problems in the form of increased cases of typhus, cholera, and gastrointestinal diseases. In this environment, the health care system had to contend with a growing health emergency without electricity. In addition to normal surgical procedures, the treatment of war wounded was hampered by operating facilities dependent on

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[127] Middle East Watch, Needless Deaths in the Gulf War, New York: Human Rights Watch, 1991, pgs 9-10, 177-183

electricity from emergency generators. Diagnostic laboratory procedures were negatively affected. Vaccines and medicines that needed refrigeration were lost.

The combination of bad water supply and malnutrition was most severe in its effects on young children. Visits to Iraq following the war by inspection teams from, UNICEF, the International Committee of the Red Cross, and other non-governmental organizations all cited the serious health crisis Iraqi civilians faced. Visits by physician's groups from the U.S. and Germany in May 1991 reported 20 children a day dying in one Baghdad hospital from gastroenteritis. In the southern city of Karbala, such cases among children had increased three to four times the normal levels. A Harvard University public health study team that surveyed the health crisis in April and May 1991 projected that as many as 170,000 children under the age of five would die in the coming year from the combined effects of disease and malnutrition. The team specifically cited the problems for public health as being related to the lack of electric capacity and made worse by the impact on the health care system.[128]

> "While children under five were the focus of this study, a large increase in deaths among the rest of the population is also likely. The immediate cause of death in most cases will be water-borne infectious disease in combination with severe malnutrition....The incidence of water-borne disease increased suddenly and strikingly during the early months of 1991 as a result of the destruction of electrical generating plants in the Gulf War and the consequent failure of water purification and

128 Ibid., pgs 10, 183-186

sewage treatment systems."[129]

The decision by the airwar planners to target the power grid system was made on the basis of military necessity. It was judged that the military advantage gained was proportionate to the immediate collateral damage that might be caused to civilians. On the basis of the current U.S. view of the noncombatant immunity, this action was not regarded as violative of the discrimination principle because it did not involve direct attacks upon civilians. Any immediate collateral deaths associated with the attacks on power facilities were unintended. Many modern just war theorists and international law experts have argued since the Gulf War, however, that this presents too restrictive a view of discrimination which does not adequately take into account the long term effects of modern warfare.

Judith Gardam has pointed out that in this case the conflict is specifically between military necessity and an enhanced concept of noncombatant immunity which has come into effect in international law due to the standards set by the 1977 Protocol I addition to the 1949 Geneva Conventions. While the U.S. is not a signatory to Protocol I, some of its basic assumptions have actually been included in more recent U.S. military manuals.[130] On this basis,

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129 Ibid., pg 185

130 For discussion of Protocol I protection of noncombatants and its applicability to current U.S. military policy as contained in military manuals, see: O'Brien, The Conduct of Just and Limited War, pgs 49-55; see also: Lieutenant Colonel Robert Gehring, USMC, "Loss of Civilian Protections Under The Fourth Geneva Convention and Protocol", Military Law Review 90: 49-87, 1980

Gardam and other international jurists argue that even though unratified by the U.S., the Protocol has the status of customary law, which is one of the recognized sources of international law, and is therefore legally and morally binding.

The basic principle of the Protocol on noncombatant immunity is that "The civilian population as such, as well as individual civilians, shall not be the object of attack. Acts or threats of violence the primary purpose of which is to spread terror among the civilian population are prohibited."[131] Most applicable to the bombing of the power system is the prescription against indiscriminate attacks "which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete military advantage anticipated."[132]

Gardam argues that current U.S. understanding of discrimination does not take into account the long term collateral damage which is "incidental" to military action and that this is just as violative of noncombatant immunity as is death by immediate attack. The problem is that failing to consider the long term deaths and damage due to such action unfairly skews the determination of proportionality involved in weighing military necessity against noncombatant immunity.[133] In other words, a realistic

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131 Protocol Additional to the Geneva Conventions of 12 August 1949, Relating to Protection of Victims of International Armed Conflict, 1125 U.N.T.S., 3, 1977; Article 51,1

132 Ibid.,Article 51, 5, (b)

133 Judith Gardam, "Noncombatant Immunity and the Gulf Conflict", Virginia Journal

understanding of the principle of discrimination in the light of modern warfare requires a fundamentally different moral calculus involved in weighing the proportionality of ten civilian technicians killed immediately in the bombing of a power station as opposed to factoring in an additional 100,000 five year olds who die over the next three months due to gastrointestinal diseases caused by impure drinking water.

> "Both the civilian casualties and the military advantage were capable of measurement. Other options were available to military commanders, which, although perhaps not as efficient in terms of time or combatant casualties, were capable of achieving the same result. This is the key to the dilemma: proportionality is a highly subjective yardstick. The demands of military necessity and the protection of the other parties' civilian population, two opposing goals, must be balanced. The military is extremely unwilling to shift the balance away from emphasis on the former....In other words, the military advantage always outweighed the civilian casualties as long as civilians were not directly targeted and care was taken in assessing the nature of the target and during the attack itself."[134]

While the actual numbers of civilian casualties experienced during the war and in its aftermath will continue to be debated and probably never known with any real certainty, the extent of casualties caused by the power grid failure does point to a problem in current understanding of noncombatant immunity. John Langan

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of International Law 32:813-836, pgs 827-833

134 Ibid., pg 832, 834

has shown that the problem is not just a matter of clarifying distinctions between direct and indirect killing, but in the way that military necessity is applied to justify an increased risk of death for civilians even if the "causal chain" between the military action and the eventual deaths is more complex. Langan points out, for example, that part of the decision to attack the power grid may have included the assumption by military planners that after the defeat of Iraq's military and the resultant overthrow of Saddam Hussein (which was in fact a stated "desire" of President Bush in numerous public pronouncements during the war), that coalition forces would have been able to manage relief and reconstruction efforts that would have ameliorated the damage done to the Iraqi infrastructure. The issue raised by the power grid action is the degree to which the "non-target list" of people and objects (hospitals, places of worship, cultural sites, etc.) traditionally protected by noncombatant immunity needs to be extended to include the very systems that are essential for those noncombatants to survive and how that need is balanced against claims of military necessity.[135]

In considering the claim that civilian suffering and deaths were not the intent of the decision to attack the grid, it is difficult to see how the effects of the disruption of electric power could have been morally justified on the basis of the principle of double effect. To argue that these effects were not directly intended, but only the foreseen indirect results of an otherwise legitimate militarily

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[135] John Langan, "Just War Theory After the Gulf War", Theological Studies 52:95-112, 1991, pgs 109-110

necessary action, that they were not a means for achieving that end, and that they were proportional to the military advantage achieved is difficult. In the first place, one of the stated secondary goals of the planners was to create civil and political disruption as a result of the breakdown of infrastructure dependant upon the electric system in the hopes that this would lead to the downfall of Saddam Hussein. In this case the claim that the effects were not directly intended is hard to explain. Moreover, as was a problem with World War II saturation bombing and as some commentators have pointed out, "What are termed collateral effects may reach a point at which it becomes very difficult to consider these effects as beside the intention of the actors. Inevitably, there is a point where one must deduce intent from effects or consequences, the determination of that point being, in turn, dependant largely on quantitative considerations."[136]

A final point that the same authors make is that the destruction of the grid must also be seen in the light of one of the prominent features of the Gulf War: the extensive use of precision guided munitions to reduce collateral deaths of noncombatants as much as possible. While the use of such weapons might lead people to believe that eventually noncombatant deaths could be prevented to a degree never possible before, this would not mean that the principle of noncombatant immunity had been secured, but only that the time and manner in which noncombatants were harmed had been deferred.

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136 Robert Tucker and D.C. Hendrikson, The Imperial Temptation: The New World Order and America's Purpose, New York: Council on Foreign Relations, 1992, pg 137-138

As long as the definition of military objectives is broad enough, the immunity of noncombatants may be just as threatened by the indirect use of "smart bombs" as it was by the direct use of "dumb bombs" in previous conflicts.[137]

> "The conclusion seems unavoidable that discrimination in war will continue to depend less on the precision of weapons, or, for that matter, on the care with which they are employed against military objectives, than on the scope and meaning that is given to military necessity (and hence to the determination of what constitutes a legitimate military objective)."[138]

By any objective standard, it must be stated in fairness that in terms of the overall conduct of the Gulf War, the principle of discrimination was observed by coalition forces to an unprecedented degree in modern warfare. In contrast to World War II where there was a stated intention to directly attack noncombatants and Vietnam where highly discriminate technological capabilities did not exist and the tactical requirements of counterinsurgency warfare made it all but impossible to avoid harming noncombatants, the Gulf War marked a significant advancement in the effort to ameliorate the direct impact of combat operations upon civilian populations. Often decisions were made not to attack legitimate targets, such as the air defense positions around Baghdad, which increased the risk to coalition forces out of concern to avoid noncombatant casualties. In part this was due to the stated

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137 Ibid., pg 138

138 Ibid., pg 138

intention of the coalition's political leaders as well as the specific decisions of military planners. Additional factors involved were the fact that most of the ground war took place in the desert away from populated civilian areas, the early advantage of allied air superiority, and the enhanced capability of modern aircraft and precision ordinance.[139] Even the Middle East Watch report, which takes a generally critical view of U.S. conduct of the war, grudgingly acknowledges that "in many if not most respects the allies' conduct was consistent with their stated intent to take all feasible precautions to avoid civilian casualties."[140]

Coalition observance of the principle of discrimination was especially noteworthy when viewed in contrast with the repeated and flagrant abuses of noncombatant immunity by Iraqi in the abuse, torture and murder of Kuwaiti civilians during the initial invasion, the firing of Scud missiles at Saudi Arabia and Israel in direct counter-population attacks on cities, the fouling of the Persian Gulf with oil in an attempt to shut down water desalination plants, the massive destruction and systematic pillaging of Kuwaiti property (including setting fire to oil wells), and the physical mistreatment of coalition prisoners of war.[141] Tellingly, critics of U.S. observance of the jus in bello principles during the war tend to gloss over these Iraqi abuses.

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139 O'Brien, "Desert Storm: A Just War Analysis", pg 821

140 Middle East Watch, pg 4

141 Johnson and Weigel, pg 34

4. SUMMARY

The World War II practices of conventional area and fire-bombing and the use of nuclear weapons against cities were all practices justified by the claim of military necessity which were fundamentally violative of the principle of discrimination. While the "precision bombing" of cities may be considered not to have violated the principle, this is only because of the application of the principle of double effect. In the former cases, the principle of double effect cannot be considered to be operative. The unique military challenge created by the nature of counterinsurgency warfare in Vietnam and the abuse of firepower that developed as a consequence of this extremely challenging tactical environment also depended on military necessity for justification in a way that resulted in the large scale overriding of the principle of discrimination. In spite of the specific intention to observe strict adherence to a high standard of discrimination and the definite improvement that precision guided munitions have made in the ability of military commanders to make those intentions relevant to the actual conduct of warfare, the Gulf War shows that the problem of reconciling military necessity and noncombatant immunity can sometimes transcend the best of intentions and capabilities. The issue of infrastructural degradation and delayed collateral deaths raises a significant problem in terms of the violation of noncombatant immunity that needs to be studied in greater detail both by military planners and by just war theorists.[142]

While this analysis of noncombatant immunity and its relation to military necessity in war is at best only a preliminary look at this issue, it does serve to show the historical development which has taken place in the application of this jus in bello principle in U.S. military and political strategy of the past fifty years. A decided shift has taken place in the intention to abide by the principle of discrimination from the World War II policy to that of the Gulf War. While some of this difference is due to the capabilities of modern weapon's technology, there is good evidence to suggest that public opinion has also had a great influence on this intention at the government policy level.

During the air war campaign of the Gulf War, for example, the sustained emphasis shown in repeated statements by U.S. government and military officials to the media on the determination

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142 The need for further study of this issue by just war theorists is especially important. One key factor which many critics of the coalition policy fail to address is the extent to which repair of Iraq's infrastructure was delayed after the war ended by the Iraqi government's refusal to immediately abide by the U.N. Security Council Resolutions 687 and 688 which required Iraq, under the terms of the cease fire, to allow the Allies to oversee the destruction of its weapons of mass destruction and to desist from its attacks upon the Kurds and Shiites in northern and southern Iraq. The ceasefire accords left the U.N. economic sanctions in place until Iraq was in full compliance with the accords and Security Council resolutions. While noncombatant deaths were certainly the indirect result of infrastructure damage, to what extent such deaths are attributable to the allies air war strategy as opposed to the Iraqi government's willingness to allow its own people to suffer unnecessarily in order to preserve the Hussein regime's long term politico-military agenda is problematic. Clearly, had Iraq immediately complied with the cease fire accords, many civilian deaths would have been avoided. Under the circumstances the attachment of moral culpability is far more complicated than some critics have suggested.

and specific efforts of coalition forces to avoid noncombatant deaths as much as possible were made out of concern to maintain public support for the war. Government efforts to conduct "damage control" for the media response to the international outcry that arose after the Amariya shelter bombing in Baghdad in which between 200 - 300 civilians were killed when coalition forces bombed an Iraqi bomb shelter which was believed to be a military command and control facility also showed the increased sensitivity at the strategic policy level to the decreased tolerance in public opinion for the violation of civilian immunity from attack.[143] In a backhanded "compliment", even Gulf War critics have highlighted the degree to which administration officials sought to show their concern for the principle of discrimination out of concern for public opinion: "The campaign to persuade the American public to believe that every effort was being taken to spare civilian lives and destruction, as well as protect Coalition military personnel, was a resounding success for the Pentagon - and for the Bush administration."[144] The television medium has made the realities of

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[143] On U.S. government concerns to publicize its commitment to observing noncombatant immunity during the air war, see: Middle East Watch, pgs 75-87. On the Amariya shelter bombing, see: Ibid., pgs 128-137

[144] Geyer and Green, pg 146. While acknowledging that concern for public opinion in regard to noncombatant immunity was a major issue for the government, Geyer and Green argue that the actual conduct of the war showed that the principle of discrimination was violated to a degree that they consider to be unacceptable. For general discussion of the impact of the media on the Gulf War and public opinion, see: W. Lance Bennett and David Paletz, eds., Taken By Storm: the Media, Public Opinion, and U.S. Foreign Policy in the Gulf War, Chicago: University of Chicago Press, 1994; Benjamin Schwarz, Casualties, Public Opinion and U.S. Military Intervention: Implications for U.S. Regional Deterrence Strategies, Santa Monica, California: Rand,

war and especially of the deaths of innocent civilians in war, a highly visual and visceral part of the common experience. In no small part this transition was affected by the media impact of the Vietnam experience. Additionally, the widespread international support for the provisions of Protocol I, in spite of the U.S. refusal to ratify the addition, is evidence as well for the decreased tolerance towards violations of noncombatant immunity in the international community.

This brief look at case studies shows that while the ethical tension between noncombatant immunity and military necessity is always present in war, the extent to which military necessity tends to override ethical concerns is dependant on many factors: technological capabilities, strategic policy, type of warfare, tactical considerations, and many others.[145] An important additional determining factor which also affects this ethical tension is the degree to which the principle of discrimination is understood as a relative or as an absolute moral principle.

1994; Bradley Greenberg and Walter Gantz, eds., Desert Storm and the Mass Media, Cresskill, New Jersey: Hampton Press, 1993; Robert Denton, ed., The Media and the Persian Gulf War, Westport, Connecticut: Praeger, 1993; John MacArthur, Second Front: Censorship and Propaganda in the Gulf War, New York: Hill and Wang, 1992

[145] One key factor in this ethical tension that is beyond the scope of this study is the degree to which the perceived jus ad bellum "just end" of a war increases the dominance of military necessity over the jus in bello principles. World War II was a clear instance of this phenomenon, that Walzer has described as the ethical justification of the "supreme emergency". When the just cause is perceived as being "just" enough, military necessity can come to have morally overriding absolute authority and the jus in bello falls by the wayside. When the enemy is evil incarnate, any and all means without limits may be used against him. When this happens, however, we have left the province of just war and are now describing "holy war" or the crusade. See: Bainton, pgs 44-52

IV. WILLIAM O'BRIEN: ANALYSIS

1. NONCOMBATANT IMMUNITY

William V. O'Brien is a scholar in international affairs and law who has written extensively in the area of modern just war doctrine. In his work, he has directed particular attention to the relationship between the jus in bello principle of discrimination or noncombatant immunity and the principle of military necessity as recognized in the law of war in international law.[146] According to O'Brien the jus in bello principle of discrimination prohibits "direct intentional attacks on noncombatants and nonmilitary targets."[147] Because noncombatant immunity has the potential to impose very specific and far reaching restraints on the conduct of war, the debate over its application has become increasingly complicated and difficult as the nature of modern warfare has become more total.

While the jus in bello principle of proportionality is by its very nature highly relativistic and so can be flexible enough to justify a broad range of actions deemed militarily necessary in warfare, the principle of discrimination has the exact opposite character: by its very nature it imposes an inflexible restriction on many means regardless of how important they may be for accomplishing the

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[146] William O'Brien, The Conduct of Just and Limited War; War and/or Survival, Garden City, N.Y.: Doubleday, 1969; Nuclear War, Deterrence and Morality, New York: Newman, 1967; Christian Ethics and Nuclear Warfare,(ed.), Washington, D.C.: Institute of World Polity -Georgetown University 1961; "Legitimate Military Necessity in Nuclear War", World Polity 2; "The Meaning of 'Military Necessity' in International Law", World Polity 1

[147] O'Brien, The Conduct of Just and Limited War, pg 42

legitimate ends of successful warfare. Many of the modern debates about the morality of war relate in some way to the principle of discrimination and are further complicated by issues surrounding the definitions of its terms: direct versus indirect attack, noncombatants, intentionality, nonmilitary targets, and double effect.

The origin of the principle of discrimination is directly related to the basic rationale for permitting the taking of life in warfare. If the fundamental presumption against killing is to be violated then it must be limited to combatants. The moral imperative underlying this overridden "prima-facie duty" is the principle that evil may not be done to accomplish good. Historically, however, the principle did not develop from this moral imperative, but from the "chivalric codes and customary practices (which) were grounded in the material characteristics of warfare during the medieval and Renaissance periods"[148] The basis for noncombatant immunity developed with the recognition of formal international law after the seventeenth century and attacks on noncombatants and nonmilitary targets were prohibited by recognized international law. Again, the observance of the practice of noncombatant immunity was based upon the material facts of the technological state of warfare and the limited nature of the wars involved. With the advent of total war, all of these elements were to change and with them the practical reality of the application of the principle of

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[148] Ibid., pg 43

discrimination in warfare.[149]

The principle issue that arises in considering O'Brien's view of noncombatant immunity is the question of whether or not it is an absolute or a relative principle. Over against those who contend that the principle is an absolute one, most notably Paul Ramsey[150], O'Brien suggests that it is not. An absolute principle of discrimination means that it is always wrong to kill noncombatants directly on the basis of the moral principle of not doing evil to produce good. Generally, those who hold such a position justify it on the basis of pacifism or by some recourse to the principle of double effect. While allowing that Ramsey's defense of an absolute principle of discrimination might be possible, at least theoretically, within conventional warfare, O'Brien contends that it simply cannot stand up to the moral dilemmas of nuclear deterrence and war.

O'Brien's argument against the absolute character of the principle of discrimination turns on several considerations. In the first place he points out that the doctrine did not develop historically within the jus in bello tradition as a derivation from philosophical or theological reflection. Rather it was the product of the actual practice of warfare influenced by the cultural values and customs of feudal society. Secondly, he suggests that in contemporary Catholic teachings on war, an absolute principle of discrimination is not the main argument put forward to deplore the problems associated with war, but that the actual Church

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149 Ibid., pgs 42-43

150 Ramsey, War and the Christian Conscience, pgs 34-59, 66-73; The Just War, pgs 153-164, 266-267, 285-366

pronouncements have tended to be generalized applications of both jus in bello principles of proportion and discrimination with more concern being shown for the disproportionate effects of modern warfare rather than its indiscriminate effects. Thirdly, he argues that the Church's ongoing affirmation of the moral right to legitimate self-defense must mean that such a right can be practically put into effect. A right which cannot be actualized is meaningless. In order for a real right of self defense to exist in the technological context of modern warfare, the principle of discrimination cannot be an absolute one as this would effectively eliminate the possibility of a credible defense.[151]

> "It is my contention that the moral, just war principle of discrimination is not an absolute limitation on belligerent conduct. There is no evidence that such a principle was ever advanced by the church, and it is implicitly rejected when the church acknowledges the continued right of legitimate self defense, a right that has always been incompatible with observance of an absolute principle of discrimination. Accordingly, I do not distinguish an absolute, moral, just war principle of discrimination from a more flexible and variable international law principle of discrimination. To be sure, the moral, just war understanding of discrimination must remain independent of that of international law at any given time. But discrimination is best understood and most effectively applied in light of the interpretations of the principle in the practice of belligerents."[152]

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151 O'Brien, The Conduct of Just and Limited War, pgs 44-45

152 Ibid., pg 45

O'Brien suggests that a denial of noncombatant immunity as an absolute principle does not necessarily mean that a valuable and important measure for placing moral limits on the effects of warfare must be abandoned. Both morally and legally the principle of discrimination can be an effective means for restraining behavior in war, though not in an absolute sense. Rather it must be reinterpreted in such a way that the concern to protect noncombatants which it expresses can be accommodated to the requirements of military necessity as reflected in modern warfare. In actuality, this problem is not a new one but has always been present within the context of the jus in bello tradition. What is different today is the extent to which modern warfare has exacerbated the problem. The principle of discrimination has always reflected difficulties in defining the meanings and the extent of its terms and their applications, especially those having to do with the nature of direct intentional killing, the means by which noncombatancy is defined and how nonmilitary targets are to be differentiated from legitimate military ones.

In referring to a standard definition of the principle of discrimination[153] O'Brien points out that historically, the apparent

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153 "It is a fundamental moral principle (unanimously accepted by Catholic moralists) that it is immoral directly to take innocent human life except with divine authorization. 'Direct' taking of human life implies that one performs a lethal action with the intention that death should result for himself or another. Death therefore is deliberately willed as the effect of one's action. 'Indirect' killing refers to an action or ommision that is designed and intended solely to achieve some other purpose(s) even though death is foreseen as a concomitant effect. Death therefore is not positively willed, but is reluctantly permitted as an unavoidable by-product." R.A. McCormick, "Morality of

dilemma created by the moral imperative against direct killing has been ameliorated by appealing to the principle of double effect and he suggests that it would be impossible for the principle to have any practical value without recourse to some kind of relativizing limitation. Despite its widespread usage in moral discourse on war, however, O'Brien expresses reservations about the validity of the distinctions made by the principle of double effect between directly intended and merely permitted or "concomitant" effects. These reservations have to do with the moral and philosophical implications of the relationship between intention and action to some extent, but on a more practical level, his concerns have to do with the problems created when the principle is used to try and justify discrimination in the context of total conventional war, nuclear deterrence and war, and revolutionary - counterinsurgency warfare, all of which he believes explode the principle of discrimination.[154]

> "It is not so hard to accept the distinction (between intended and concomitant effects) in a case where the concomitant undesired effect was accidental (for example, a case where the attacker did not know that noncombatants were present in the target area). There would still remain, in such a case, a question as to whether the attacker ought to have known that noncombatants might be present. Nor is it so hard to accept a double-effect justification in a situation where the attacker had reason to believe that there might be noncombatants present but that this was a remote

War", New Catholic Encyclopedia, New York: McGraw Hill, 1967, Vol 14, pg 805

154 O'Brien, The Conduct of Just and Limited War, pgs 45-47

> possibility. If, however, the attacker knows that there are noncombatants intermingled with combatants to the point that any attack on the military target is highly likely to kill or injure noncombatants, then the death or injury to those noncombatants is certainly 'intended' or 'deliberately willed' in the common usage of those words."[155]

In O'Brien's view, an absolutizing of the principle of discrimination means that one must fall back upon some form of double effect principle in order to legitimize, morally, the inevitable violations of noncombatant immunity that must eventuate in war. The problem is that the scale of such violations in modern warfare has the effect of reducing the principle of double effect to "...a kind of moral double-talk that appears unconvincing and perhaps hypocritical." His solution to this dilemma is to regard the principle of discrimination as a relative rather than an absolute concept. As a relative principle, it still calls for keeping the greatest possible degree of noncombatant immunity in warfare, but it does so with the awareness that some actions taken against combatants will also be done with a conscious, albeit regretted, intention of injuring noncombatants. The degree to which such violations of the principle of discrimination can be morally justified must be determined by recourse to a principle of proportionality in balancing the relative utility of the combatant and noncombatant deaths.

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[155] Ibid., pg 47

> "But if the principle of discrimination is viewed as a relative principle enjoining the maximization of noncombatant protection, it seems possible to employ double-effect explanations for actions where the major intention is to effect counterfource injury on military objectives while acknowledging an inescapable intention of injuring countervalue targets and thereby predictably violating the principle of discrimination to some extent.[156]

While the problem of intentionality can be addressed by making the principle of discrimination a relative rather than an absolute concept, O'Brien argues that the issue of defining noncombatants and nonmilitary targets raises more difficult issues for the principle that may in fact invalidate it altogether. This is because the assumption underlying the principle of discrimination derives from the medieval context of the jus in bello in which combatants and noncombatants could be easily separated and distinguished, an assumption which is no longer the case in modern warfare.

Historically, as warfare has expanded from confrontations between relatively small, professional armies to total warfare involving the mobilization of the resources of entire nations it has become impossible to distinguish between the military forces of a nation and the logistical and industrial base by which the modern nation state provides for its forces. The nature of the modern "military-industrial complex" makes the "home front" inseparable from the "battle front" in the prosecution of modern warfare. In this context, attacking the industrial base becomes a legitimate

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156 Ibid., pg 47

means of reducing the capacity of a belligerent to support the war effort. Such direct intentional attacks have proven to be the source of major violations of noncombatant immunity. The question arose as to what extent a civilian maintains his status as a noncombatant by his participation in the overall war effort of the nation. Additionally, the nature of modern industry with its association with large concentrations of noncombatants in urban areas made the determination of military targets more difficult as many industrial facilities served a dual military and civilian function.

The beginning of the erosion of the principle of noncombatant immunity could be seen in the American Civil War when attacks on the industrial base of the Confederate war effort were viewed as a legitimate means. Strategic maritime blockades employed in World War I which affected the entire population of whole nations caused a further devaluing of the principle of noncombatancy. The development of new military tactics and technologies in World War II, such as aerial bombardment of cities and unrestricted submarine warfare, and the further acceptance of the concept of total mobilization lead to the virtual elimination of the distinctions between combatants and noncombatants.[157]

> "In summary, well before the advent of weapons systems that are usually employed in ways that do not discriminate between traditional combatants and noncombatants, military and nonmilitary targets (i.e. nuclear weapons), the distinction had eroded. The wall of separation between combatants and noncombatants

157 Ibid., pgs 48-49

> had been broken down by the practice of total societal mobilization in modern total war and the resulting practice of attacking directly and intentionally that mobilization base. Given these developments, it was difficult to maintain that the principle of discrimination was still a meaningful limit on war.[158]

In spite of the erosion of the regulative force of noncombatant immunity in international law and the potential eradication of the principle of discrimination entirely by the advent of nuclear weapons, O'Brien acknowledges that the opposite has in fact taken place in international law with the drafting of the 1977 Geneva Protocol I which provides specific provisions in positive law for the distinction and protection of noncombatants in war. However, in spite of the fact that the United States military has given de facto acknowledgement to the Protocol by incorporating much of its language into official military manuals, O'Brien remains sceptical that the Protocol will have much practical effect on regulating warfare by increasing observance of the principle of discrimination.[159]

In summary, O'Brien presents us with an alternative to the traditional understandings of the jus in bello principle of discrimination. He rejects the absolutist view of discrimination because its literal application obviates the possibility of legitimate self-defense in modern warfare. He regards the traditional view in which violations of the absolute principle of noncombatant immunity

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158 Ibid., pg 49

159 Ibid., pgs 49-55

are qualified by appeal to the principle of double effect as being intellectually and morally unsustainable. Rather, O'Brien argues, the principle of discrimination should be viewed as a relative concept which requires belligerents to attempt to keep the killing of noncombatants to a minimum. Determination of what constitutes an allowable minimum level of noncombatant "collateral damage" must be based on determinations of proportionality between the destruction of military objectives and the deaths of noncombatants.

2. MILITARY NECESSITY:

O'Brien's position, then, amounts to a concept of "relative discrimination plus proportional collateral damage". In his view, for instance, the destruction of a priority military objective justifies the intentional, proportionate destruction of associated civilian or noncombatant assets, whereas the destruction of an ordinary military target, or a target that could be neutralized by other means, with disproportionate damage to noncombatants would not be justified.[160]

> "Instead, I contend that the principle of discrimination is an important, but not absolute, principle of just war doctrine. In order to interpret this principle reasonable, it is necessary to evaluate the proportionality of civilian, countervalue damage to the military damage and advantage required by legitimate military necessity....The

[160] William O'Brien, "Just War Doctrine in a Nuclear Context", Theological Studies 44: 192-220, 1983, pgs 211-212; "Desert Storm: A Just War Analysis", St. John's Law Review 66: 797-823, 1992, pgs 820-822

> close relation, then, of the war conduct principles of proportion and discrimination is apparent. Belligerent action must meet the requirements of true military necessity while satisfying the requirement of discrimination that military measures not inflict disproportionate damage on civilians and civilian targets.[161]

In offering this departure from the traditional principle of discrimination, the question arises as to how one determines the proportional value of noncombatant deaths against military objectives? O'Brien's answer to this problem is to offer the principle of military necessity as the determining factor in assigning value to the moral calculus of proportionality. Key to this argument is the specific definition of what he calls "legitimate military necessity", a concept he has developed which combines the features of definitions of military necessity recognized in international law with the jus in bello principles of proportion and discrimination.

American understanding of the internationally recognized law of war is reflected in the military manuals of the United States armed forces. Most of these recognize three principles which underlie the law of war: military necessity, humanity, and chivalry. O'Brien draws upon the definitions of these principles found in the most recent Air Force manual, AFP 110-31, to articulate his own definition of legitimate military necessity.

"MILITARY NECESSITY: Military necessity is the principle

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161 Ibid., pg 821

> which justifies measures of regulated force not forbidden by international law which are indispensable for securing the prompt submission of the enemy, with the least possible expenditure of economic and human resources.
>
> HUMANITY: Complementing the principle of necessity and implicitly contained within it is the principle of humanity which forbids the infliction of suffering, injury or destruction not actually necessary for the accomplishment of legitimate military purposes. This principle of humanity results in a specific prohibition against unnecessary suffering, a requirement of proportionality....(it) also confirms the basic immunity of civilian populations from being objects of attack during armed conflict. This immunity of the civilian population does not preclude unavoidable incidental civilian casualties which may occur during the course of attacks against military objectives, and which are not excessive in relation to the concrete and direct military advantage anticipated.
>
> CHIVALRY: Although difficult to define chivalry refers to the conduct of armed conflict in accord with well recognized formalities and courtesies....The principle of chivalry makes armed conflict less savage and more civilized for the individual combatant."[162]

Military necessity is a concept which is recognized both by law and by common usage within the military as an institution. It is a utilitarian principle which legitimizes the use of regulated coercive force as a means to accomplish a given end. It corresponds to the

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[162] International Law: The Conduct of Armed Conflict and Air Operations, 19 November 1976, AFP 110-31, Washington,D.C.: Department of the Air Force, 1976; para. 1-5-6,1-6, cited in O'Brien, The Conduct of Just and Limited War, pg 64

basic assumption of just war doctrine that the use of force may be justified under certain specified circumstances. Such force may not be unlimited but must be regulated and must be truly necessary. In other words, it must have true utility directed towards a legitimate end and its use must be proportionate to that end. Additionally, such use of force must be in consonance with the provisions of the international law of war.

The concept of humanity contained in the law of war is the source of the principles which govern the use of force: proportionality and discrimination. Here the law of war is coterminous with the just war jus in bello in terms of its application of these principles although it reflects a different source for the derivation of those principles. While the just war principles have been derived from the multiple sources of theology, natural law and custom, in the law of war they derive from the secular humanist principle of "humanity". O'Brien argues that despite the apparent conflict between these sources, in fact the principle of humanity serves the same purpose as natural or divine law in just war doctrine by acting as a form of higher authority which can be appealed to beyond the conventions of mere custom.

The principle of chivalry, while viewed by the modern law of war as being of less immediate application, is nonetheless an important source of limitation of the cruelties of war by its demand that the enemy be seen as a human being and as an honorable opponent who must be treated justly and dealt with in good faith. It bears a close affinity, in O'Brien's view, with the jus in bello principle of

discrimination because of the contribution which the medieval chivalric code made to the development of the principle in the just war tradition.[163]

In drawing upon these principles of international law and showing their basic consonance with the requirements of the jus in bello, O'Brien puts forward his own definition of legitimate military necessity which he has suggested is to be the determining factor in defining the limits of proportionality for his principle of relative discrimination.

> "Legitimate military necessity consists in all measures immediately indispensable and proportionate to a legitimate military end, provided that they are not prohibited by the laws of war or the natural law, when taken on the decision of a responsible commander, subject to review."[164]

In O'Brien's formulation the jus in bello principle of discrimination is preserved in the law of war under the subprinciple of humanity and as part of the natural law contained in the just war tradition. He argues that an act of war that meets the requirements of this definition is a legitimate act of military necessity and is "...justified under the just war jus in bello and the positive international law."[165]

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163 O'Brien, The Conduct of Just and Limited War, pgs 64-66

164 Ibid., pg 66

165 Ibid., pg 67

V. PAUL RAMSEY: ANALYSIS

1. NONCOMBATANT IMMUNITY

A. Absolute Immunity and the Christian Love Ethic:

Paul Ramsey is widely recognized as one of the leading Protestant ethicists in the revival of just war doctrine in the post-World War II era. While he has written extensively within the just war tradition, it has been suggested that some of the positions that Ramsey has advanced differ substantially from classical expressions of the tradition. James Turner Johnson, for example, has pointed out that Ramsey differs significantly from classic just war doctrine both in his view of the sources from which the doctrine developed and in his understanding of the main uses to which it should be put in modern applications of the tradition.[166] As Johnson has shown, the historical development of just war doctrine came from four different sources, two of which (the chivalric code and the medieval development of Roman jus gentium) were distinctly secular.[167] For Ramsey, however, the true foundation of the tradition is the Christian moral principle of agape (love.) In his discussion of the development of the tradition, Ramsey focuses

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[166] James T. Johnson, "Morality and Force in Statecraft: Paul Ramsey and the Just War Tradition", in Love and Society: Essays in the Ethics of Paul Ramsey, James T. Johnson and David Smith, eds., Missoula, Montana: American Academy of Religion/Scholars Press, 1974, pgs 93-95

[167] James T Johnson, Religion, Ideology, and the Limitation of War; Just War Tradition and the Restraint of War; Can Modern War be Just, New Haven: Yale University Press, 1984

heavily on the role that the love principle played in the work of Augustine and Aquinas as the seminal thinkers in the tradition. The controlling influence that this has on his thought is also seen in the emphasis he places on the jus in bello rather than the jus ad bellum as the central focus of his thinking about just war doctrine. In this regard Ramsey is most noted for the determinative role he assigns the jus in bello principle of discrimination or noncombatant immunity as an absolute moral principle which governs most of his applications of just war doctrine to specific cases and issues within the tradition.

For Ramsey, the principle prohibiting both the unlimited and indiscriminate killing of combatants as well as the direct killing of the innocent in war is a product of the Christian ethical principle of agape and as such is an inviolable moral absolute. This position is based on the biblical principle that evil means may never be used to accomplish a good end and the proscriptive command of the moral law prohibiting murder. The intentional, direct killing of the innocent, that is, those who are not directly participating in hostilities or closely cooperating with combatant forces is, in Ramsey's view, a moral evil that can never be ethically justified. The same principle of love that justifies the Christian's participation in warfare provides the morally limiting source of guidance for what the Christian may and may not do in such warfare. It does this principally by surrounding with moral immunity from direct attack all those not directly related to the prosecution of the

conflict, and especially the weak and the helpless.[168]

> "In determining justifiable and unjustifiable warfare, the work of love will be to return ever again to the prohibition of the direct killing of any person not directly or closely cooperating in the force which should be resisted....That product of agape in Western thought, the doctrine of the just and limited war, must happen again as an event in the minds of men and in Christian ethical analysis in every age. He who has gone so far as to justify, for the sake of justice and the public order, wounding anyone whom by his wounds Christ died to save, will find no way of escape from the moral limitation upon the conduct of war which requires that military force be mounted against the attacking force and not directly against whole populations. Christian love should again, as in the past, surround the little ones with moral immunity from direct killing. It should discern the difference between just war and murder."[169]

B. Ethical Precedent: Augustine and Aquinas

For Ramsey, then, it is the agape principle at work in the overall Christian mindset of traditional just war thinking as developed especially by Augustine and Aquinas that forms the basis for his own unique understanding of just war. In order to follow Ramsey's development of the tradition and especially his view of noncombatant immunity, therefore, we must understand his interpretation and use of the work of Augustine and Aquinas.

In his approach to Augustine, Ramsey suggests in the first place

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168 Ramsey, War and the Christian Conscience, pgs xv - xxi; The Just War, pgs 143-145

169 Ibid., pg xx

that while Augustine was indeed the first systematic formulator of a theological apologetic for participation in justified warfare within Christian thinking, he did not have an entirely uncritical view of the nature of the social justice of the nations of this world which such warfare was intended to uphold. Rather, Ramsey argues, the same criticism which Augustine directed at the pagan personal virtues, he also directed at the corporate or public virtues of pagan society.

With regard to the personal (cardinal) virtues of prudence, justice, courage, and temperance, Augustine believed that this fourfold division came from the four forms of love as human action was directed towards obtaining the desired ends of man's loves. Because such ends are only temporal and ultimately perish, men are driven by the love of that which they can never ultimately possess. From this Augustine derived his well known maxim that the human heart was ultimately restless until it rested in the God who had made man for himself. The earthly loves that men pursue are not only vain but ultimately selfish, because even when men pursue that which is virtuous there is still human pride mixed with their motives which taints such virtue and makes it in fact only a more splendid vice. For Augustine, "Where there is no true religion, there can be no true virtue."[170] True virtue is ultimately a matter of the condition or intention of the heart. While the "good" pagan might have the "form" of a virtuous act, he lacked the "substance" of true virtue because his heart was not motivated by the proper intention

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[170] The City of God, V, 13; cited in Ramsey, War and the Christian Conscience, pg 17

of charity born of love for God.[171]

It is this distinction Augustine makes between the form and substance of an act which must be kept in mind, Ramsey argues, in reading his statements about justice and the nature of the state and in his views on the theory of just war. While pagan justice might have had the formal appearance of justice, it lacked the substance of it since it was not informed by true love. For Augustine this problem as it pertained to personal virtue also applied to the social virtue of the nations which such individuals composed. "When a man does not serve God, what justice can we ascribe to him...? And if there is no justice in such an individual, certainly there can be none in a community of such individuals."[172] It is this conception of justice which underlies Augustine's statements about the kinds of wars in which participation by Christians was justified.

> "How many great wars, how much slaughter and bloodshed, have provided this unity (of the imperial city)! And though those are past, the end of these miseries has not yet come. For though there have never been wanting, nor are yet wanting, hostile nations beyond the empire against whom wars have been and are waged, yet, supposing there were no such nations, the very extent of the empire itself has produced wars of a more obnoxious description - social and civil wars - and with these the whole race has been agitated, either by the actual conflict or fear of a renewed outbreak. If I attempted to give an adequate description of these manifold disasters, these stern and lasting necessities, though I am quite unequal to the task, what limit could I set? But, say

171 Ramsey, War and the Christian Conscience, pgs 15-18

172 The City of God, XIX, 21; cited in Ibid., pg 26

> they, the wise man will wage just wars. As if he would not all the rather lament the necessity of just wars, if he remembers that he is a man; for if they were not just he would not wage them, and would therefore be delivered from all wars. For it is the wrongdoing of the opposing party which compels the wise man to wage just wars; and this wrongdoing, even though it give rise to no war, would still be matter of grief to man because it is man's wrongdoing. Let every one, then, who thinks with pain on all these great evils, so horrible, so ruthless, acknowledge that this is misery. And if any one either endures or thinks of them without mental pain, this is a more miserable plight still, for he thinks himself happy because he has lost human feeling."[173]

Inherent in Augustine's analysis of the nature of "just war", then, is his awareness of the mutuality of wrongdoing on both sides of the conflict in a just war, rather than a clear cut case of a guilty and innocent party based on a universally defined and accepted standard of justice. In other words, Ramsey argues, "If Augustine believed that there is always only one side that can be regarded as fighting justly in the wars in which a Christian should find himself responsibly engaged, he should not have believed this. For his own analysis of the pax-ordo-formal justitia or jus of nations gives no ground for any such conclusion in every case, perhaps not in most cases."[174] Just as personal virtue arises from the pursuit of individual loves, social virtues like justice arise from that love or desire that a people have for a love which they share in common. Similarly, as there is always a gap between that which can be

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[173] The City of God, XIX, 7, cited in Ibid., pg 27

[174] Ramsey, War and the Christian Conscience, pg 28

desired and actually obtained for the individual, so too for the state there will always be that for which men have desire but cannot obtain. There will always be some temporal good that the state wills but cannot entirely achieve and so the social loves of a people will always be fratricidal to some degree. Cain, after all, was the founder of the earthly city.

For Augustine, this fratricidal love and the brotherly love which is based on love for God are intermingled throughout human history. Just as no individual is without the effects of sin, neither is any people, and so the justice of any state will of necessity be tainted by the effects of men's divided hearts. While the Christian may participate in just wars because his life is bound up with those of his neighbors and all must seek for the common good and those things which will preserve life, his participation is not based upon the notion that one side in the conflict has justice on its side and the other does not. Augustine is keenly aware of man's common fallenness and the fact that God's judgement, often in the form of war, overarches the "justice" of even the justified war.[175]

> "At least at the outset, the just war theory did not rest upon the supposition that men possess a general competence to discriminate with certainty between social orders at large by means of clear, universal principles of justice, so as to be able to declare (without sin's affecting one's judgement of his own nations cause) one side or social system to be just and the other's unjust. This was not the premise by which Augustine came to a confident enough judgement as to a Christian's

175 Ibid., pgs 28-32

> responsibility in justifiable (if not unambiguously just) war. My contention is that Christian ethics may attribute to ordinary men, and to their political leaders, a capacity to know more clearly and certainly the moral limits pertaining to the armed action a man or a nation is about to engage in, than they are likely to know enough to compare unerringly the over-all justice of regimes and nations."[176]

Ramsey draws two conclusions from his view of Augustine's understanding of justifiable war that affect his own development of the tradition. In the first place, he rejects the classical tradition's increasing reliance on natural law concepts of justice in the analysis of justifying causes for war, arguing that Augustine was correct in believing that people are united more by their common sense of purpose and shared social good than by abstract ideas of justice. Most importantly for our interests in this study, though, it is primarily because of this rejection of natural law that Ramsey focuses his attention not on the jus ad bellum, but rather on the jus in bello. Traditionally, this has been regarded as the weakest element in the tradition and the latest in its development. Ramsey instead argues that precisely because of the problem of trying to determine the justice of one side or another in any conflict, more profitable attention should be given to the ethics of the manner in which a conflict is actually conducted.

> "I propose, however, that we seriously reconsider this question of the just conduct of war. For it may well be

[176] Ibid., pg 32

> the case that natural reason falters in attempting to make large comparison of the justice inherent in great regimes in conflict but is quite competent to deliver verdict upon a specific action that is proposed in warfare. It is striking that Christian theories of justified war in the past have directed attention at least as much to the conduct as to the ultimate and large scale consequences of military action."[177]

Ramsey's approach to the work of Augustine and Aquinas is unique in that he does not refer primarily to their texts which address war directly and which are normally associated with these writers' historical advancements to the tradition. Johnson has suggested that this is a reflection of Ramsey's "constructive and theological" concerns as opposed to a simple historical approach to their work.[178] What Ramsey focuses on is their views on the legitimacy of self-defense against the use of force. This is due to his concern to establish the foundational character of agape in their thinking on just war in validation of his own approach.

Ramsey points out that while Augustine is clearly supportive of the rationale for Christian participation in the public defense, he was opposed to the Christian's use of force for self-defense. Similarly, he suggests that Aquinas was equally reluctant to grant the principle of self-defense against an aggressor as an inherent right, in spite of the development of canon law principles allowing self-defense and his own views of natural law.

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177 Ibid., pg 33

178 Johnson, "Morality and Force in Statecraft", pg 104

Ramsey draws on Augustine's distinction between the legitimacy of self-defense as allowed for by the justice of pagan law and the love informed justice of a Christian view of the value of human life. Augustine allows that there is a difference between killing an unjust aggressor and killing the innocent. However, he questions the validity of a Christian's making use of the law's permission to kill even an unjust aggressor and thereby granting it a priority over Christian love. To love things and even one's own life more than God and one's neighbor is to fail to adequately appropriate the reality of divine charity in one's own life. If self-defense was intrinsically just in Augustine's view, Ramsey argues, then it would obviously be the basis for his theory of just war. Since, instead he denies the legitimacy of self-defense, then the sole motivation for the use of force must be the response of Christian love to protect the life of the innocent neighbor who is unjustly threatened by war. While defense of oneself can never be totally devoid of an element of self-love, defense of the innocent neighbor can and so is licit.[179]

> "That law therefore, which for the protection of citizens orders foreign force to be repulsed by the same force, can be obeyed without a wrong desire: and this same can be said of all officials who by right and by order are subject to any powers. But I see not how these men (who defend themselves privately), while not held guilty by law, can be without fault: for the law does not force them to kill, but leaves it in their power. It is free therefore for them to kill no one for those things (life or possessions) which they can loose against their own will, which things therefore they ought not to

[179] Ramsey, War and the Christian Conscience, pgs 35-39

> love....Wherefore again I do not blame the law which permits such aggressors to be slain: but by what reason I can defend those who slay them I do not find....How indeed are they free of sin before Providence, who for those things which ought to be held of less worth are defiled by the killing of a man?"[180]

Turning his attention to Aquinas, Ramsey interprets his affirmative answer to the question of whether it is lawful to kill in self-defense as a strictly limited one. "The only case in which it is right to intend to kill even an unjust assailant would seem to be when, in acting for the public defense one refers this intentional killing as a means to the public good."[181] Ramsey points out that Aquinas' answer is a decidedly qualified one, and from his perspective, its most important feature is that Aquinas does not base his answer purely on grounds of natural justice.

> "I answer that, Nothing hinders one act from having two effects, only one of which is intended, while the other is beside the intention. Now moral acts take their species according to what is intended, and not according to what is beside the intention, since this is accidental as explained above....Accordingly the act of self-defense may have two effects, one is the saving of one's life, the other is the slaying of the aggressor. Therefore this act, since one's intention is to save one's own life is not unlawful, seeing that it is natural to everything to keep itself in being, as far as possible. And yet though proceeding from a good intention, an act may be rendered unlawful, if it be out of proportion to the end. Wherefore

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180 De Libero Arbitrio, Bk.I, Chap. V, trans. F.E. Tourscher, Peter Reilly Co., 1937, pg 25-29, cited in Ibid., pg 36

181 Ramsey, War and the Christian Conscience, pg 40

> if a man, in self-defense, uses more than necessary violence, it will be unlawful; whereas if he repel force with moderation his defense will be lawful, because according to the jurists, it is lawful to repel force by force, provided one does not exceed the limits of a blameless defense. Nor is it necessary for salvation that a man omit the act of self-defense in order to avoid killing the other man, since one is bound to take more care of one's own life than of another's. But as it is unlawful to take a man's life, except for the public authority acting for the common good, as stated above, it is not lawful for a man to intend killing a man in self-defense, except for such as have public authority, who while intending to kill a man in self-defense refer this to the public good, as in the case of a soldier fighting against the foe, and in the minister or the judge struggling with robbers, although even these sin if they be moved by private animosity."[182]

While Aquinas, unlike Augustine, allows for the act of personal self-defense itself, he does so only with the provision that such self-defense be done without actually directing the intention of the will to the act of killing. The defender's intention in killing the unjust aggressor must be restricted to that of saving his own life. Aquinas does not say that intending to kill an aggressor is inherently right. In fact the only case he allows that such an intent might be licit is in the case of a public person - the soldier, magistrate or judge intending to kill someone in self-defense - who refers this intent to the public good, and yet even these sin if their intention is tainted with personal hostility. In the process of drawing out this distinction between act and intention, Aquinas provides the first

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[182] Summa Theologica, II-II, Q. 64, Art. 7, cited in Ibid., pg 39-40

formulation of the principle of double effect.

Like Augustine, Ramsey argues, Aquinas does not legitimize the direct killing of another man in self-defense and then universalize this principle as the source of his view for defense of the common good in war. For Aquinas no less than Augustine, the basic rule of Christian love is that one may not directly intend the death of any man. This is especially important given the greater place that the natural law principle of self-preservation has in Aquinas' thinking. For Ramsey, this is a highly significant indicator that Aquinas' thought on killing is still ruled by the principle of agape in action. Aquinas' formulation of the principle of double effect was, in essence, the result of his effort to resolve the tension between the two seemingly irreconcilable demands of self-preservation and agape.[183]

> "Be that as it may, it is significant that Aquinas has much the same trouble in his Christian conscience as Augustine did when dealing with the case of private self-defense....No matter how many Canonists may have declared it always to be right, as a general principle, to defend, with every proportionate and necessary means, justice against injustice, it is clear that Aquinas still thinks about these questions from the point of view of love, or of love-transformed justice, even if not to the measure this was operative in Augustine's thought. In order to wrest from his ancient moral heritage practical, down-to-earth conclusions, while as a Christian unable to depart wholly from it, this great Doctor of the Church was driven to formulate for the first time clearly, the

183 Ramsey, War and the Christian Conscience, pgs 39-42

principle of the double effect."[184]

Aquinas' formulation of the principle of double effect contained both a subjective and an objective element. Subjectively, in the case of killing an aggressor in self-defense, the intention of the defender must be properly directed towards the preserving of his own life rather than the taking of the aggressor's life which is an unavoidable but unintended secondary effect. Here, in Ramsey's view, what "justice" allows has been transformed by Christian love so that self-defense is not unlawful. Objectively, the act of self-defense in itself must be proportional to the threat. If at all possible the death of the aggressor must be avoided if the defender can preserve his life by another means. As a secondary effect, the aggressor's death may be allowed only if it is proportionate to the good which is directly intended. Ramsey argues that in formulating the principle of double effect, Aquinas was not being driven solely by a consequentialist ethic or a natural law sense of justice. Had he been so motivated he would simply have said that there is nothing wrong with intending to kill an aggressor because it was intrinsically right to do so. Rather, underlying Aquinas' thought is "what justice transformed by love requires to be extended even to him who wrongfully attacks."[185]

C. Noncombatant Immunity and the Principle of Double Effect.

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184 Ibid., pgs 41-42

185 Ibid., pg 44

For Ramsey, Aquinas marks the highpoint of just war thinking because it is from the principle of double effect that the notion of the immunity of noncombatants from direct attack in war developed. Ramsey derives this view from the way he believes the principle of double effect was utilized after Aquinas. Cardinal Cajetan's early sixteenth century commentary on Aquinas reiterated the principle and was the first to apply it to the deaths of innocent persons. Subsequently, moral theologians generally stopped using the principle in relation to self-defense from an unjust aggressor, regarding this as a simple case of natural law which was inherently just and therefore could rightly be intended. Double effect came to be applied principally to the problem of killing the innocent as the indirect effect of an act which had as its primary intention and independent effect, the attainment of some good end. Eventually it came to be regarded as a basic principle of Roman Catholic moral theology in the area of imputability.[186]

The modern formulation of the principle of double effect clearly goes beyond Aquinas' conception in its form and precision. As it is commonly understood today, the principle allows that the secondary evil consequences of an action are not morally imputed when: (1) the action in itself is good or at least indifferent; (2) some good effect of the action and not its evil effect must be what is intended by the action; (3) both effects must be the simultaneous result of the good action and the evil effect may not be the means of producing the good effect, and; (4) the evil effect must be proportional to the good

186 Ibid., 45-47

effect. As applied to the killing of noncombatants, the principle allows for the foreseen and unavoidable killing of noncombatants as an unintended secondary effect of a legitimate act directed at combatant forces or legitimate military objectives.[187]

In the process of its development, however, Ramsey suggests that the principle has been significantly altered from the form and application that Aquinas originally used it for and to such an extent, that many commentators deny that Aquinas used the principle at all. For Ramsey, the significant point in this historical blindness to one of the primary sources of modern ethical insight has been that it has prevented commentators from appreciating the influence of the principle of "love transforming justice" in Aquinas' thinking and in the genesis of the just war tradition. The significance of this for Ramsey's thinking on just war doctrine is fundamental, because it is from this foundational principle of agape, which he sees as being instrumental in the thinking of the paradigmatic figures in the Christian just war tradition that he draws his convictions on the nature of noncombatant immunity as an absolute moral principle. From Ramsey's viewpoint, the agape principle which finds its penultimate expression in the moral immunity of the innocent from attack, needs to be given renewed prominence in modern just war thinking.[188]

> "The point that needs stressing is that the limitation placed upon conduct in the just war theory arose not

[187] Ibid., pg 48

[188] Ibid., pgs 47-59

> from autonomous natural reason asserting its sovereignty over determinations of right and wrong (and threatening to lead Christian faith and love, which are and should be free, into bondage to alien principles), but from a quite humble moral reason subjecting itself to the sovereignty of God and the lordship of Christ, as Christian men felt themselves impelled out of love to justify war and by love to severely limit war."[189]

D. Noncombatant Immunity and Modern Warfare.

Ramsey has responded in great detail to the charge that the nature of modern warfare has made the principle of the absolute immunity of noncombatants from attack practically unworkable. Generally, this objection has been made on the basis of both the nature of modern conventional and nuclear weapons and the structure of modern industrial society. In effect, modern weapons can no longer be used within the bounds of a principle of discrimination because they are inherently indiscriminate. Moreover, the complex nature of modern societies and the vast intermingling of a society's economic and industrial forces with its prosecution of the war effort makes it impossible to distinguish between combatants and noncombatants anymore.

In answering these charges, Ramsey draws on the work of the Roman Catholic ethicist John Ford who argued against the Allies' World War II practice of strategic obliteration bombing as a violation of the just war principle of discrimination. Following Ford, Ramsey points out that the modern notion that noncombatants cannot be identified is erroneous. One does not need to know who

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189 Ibid., pg 59

and where noncombatants are, only that there are noncombatants in the area of conflict. The moral immunity of such noncombatants from direct attack means that warfare should be counter-forces directed and limited to legitimate military targets. Moreover, he suggests that the burden of proof for arguing that a population all become combatants in warfare rests upon those who would remove the traditional immunity of noncombatants from attack. Such a charge can only make sense if one allows that all civilians become combatants in a state of war, a concept that is not the result of the failure of just war categories to make moral sense, but of the failure of those who prosecute war to apply just war principles to their thinking. The argument is further flawed in that it fails to recognize that in the past when just war principles were more generally respected populations did support the war effort of their armies and yet noncombatancy as a principle was still maintained, but also that today the vast majority of civilians do not contribute to a degree that can legitimately be held to revoke the principle of immunity from direct attack.

Modern imprecision in the use of terms defining the nature of noncombatants adds to the problem in Ramsey's view. "Innocence" historically refers to the fact that the noncombatant does not directly participate or immediately cooperate in the prosecution of hostilities. Today the notion of cooperation has been so expanded and universalized beyond its classical sense of immediate and material cooperation that it effectively comes to include even young

children. Ramsey takes this as indicative less of the changes which modern warfare has produced as of the erosion of moral thinking in society which points to the very reason why just war principles need to be reinstated in the common perception of war. The notion that all citizens "support" the war effort and therefore are legitimate objects of direct attack is simply wrong, objectively as well as morally.[190]

> "This is not a statement of fact about how today a whole people wages war, but of how on their supposed behalf the war may in fact be immorally waged against an enemy, and how the enemy may actually wage it against them....That is a measure of our barbarism, and not a factual report of the changes brought about by modern warfare in placing all the people in the position of making war."[191]

The principle of noncombatant immunity is also where one must start in any consideration of the indiscriminate nature of modern weapons. Ramsey believes that any weapon can be judged against the standard of whether it can be used in a counterforce mode, and that those that cannot may be immoral in their very nature. But such a determination can only be made if noncombatant immunity is accepted as a valid principle. Rather than focusing attention on the nature of weaponry, though, Ramsey argues that the real need is to redirect attention back to the principles of limited or just war in order to keep war subordinate to the requirements of civilized

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190 Ibid., pgs 68-73; The Just War, pgs 154-164

191 Ramsey, War and the Christian Conscience, pg 70

life.[192] "It is better, in short, to begin with the traditional immunity from direct killing surrounding noncombatants in the just war theory, than with only the limitation of proportionate grave reason or lesser evil."[193]

2. MILITARY NECESSITY

Although Ramsey devotes virtually no attention to the discussion of military necessity directly, it is a general presumption subsumed under his whole discussion of the conduct of war based on his focus on the principle of discrimination. Military necessity, understood as the use of lawfully recognized means indispensable for securing the submission of the enemy as soon as possible, is the underlying basis for all legitimate military actions. While Ramsey nowhere gives an explicit definition of the principle, it is clear that he assumes it to be a legitimate norm of military theory and practice in his discussion of military action in the context of observing the moral norm of noncombatant immunity. Military necessity, ultimately, underlies the very justification of the legitimacy of the use of force as a lawful means for defending the life of the neighbor out of Christian love. In effect, for Ramsey, military necessity is the presumption regulating the specific means of applying force, once the general use of force has been determined by application of the agape principle. Once love determines that force must be used, military necessity determines the specifics of when and how it

192 Ibid., 153-162

193 Ibid., pg 154

should be used.

> "Thus Christian conscience shaped itself for effective action. It allowed even the enemy to be killed only because military personnel and targets stood objectively there at the point where intersect the needs and claims of many more of our fellow men. For their sakes the bearer of hostile force may and should be repressed. Thus participation in war...was justified as, in this world to date, an unavoidable necessity if we are not to omit to serve the needs of men in the only concrete way possible, and maintain a just endurable order in which they might live."[194]

While military necessity is regulative of the use of that force which the agape principle requires for the protection of the innocent, in Ramsey's view, it can never be a legitimate rationale for directly and intentionally violating the very moral norm which gave it "birth". This is in effect an implication of Ramsey's "twin born" conception of the legitimizing and limiting function of the principle of discrimination. The very principle which demands military means to protect the innocent provides the limitations upon how the innocent can be protected. Military necessity, therefore, can never justify the direct killing of noncombatants though it can be accepted as a regrettable and unfortunate reason for the indirect and unavoidable collateral deaths of noncombatants which may take place as the result of actions of legitimate military utility. What Ramsey refers to as the "distinction between legitimate and

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194 Ramsey, The Just War, pg 143

illegitimate military objectives" is in effect the distinction between actions which can and cannot be justified by military necessity.

> "The principle of discrimination is shorthand for the 'moral immunity of non-combatants from direct attack.' This does not require that civilians should never be knowingly killed. It means rather that military action should, in its primary (objective) thrust as well as its subjective purpose, discriminate between directly attacking combatants or military objectives and directly attacking noncombatants or destroying the structures of civil society as a means of victory. When this distinction is made, it becomes clear that the later is the meaning of murder, which is never just even in war; while the former is the meaning of the killing in war which can be justified, including the collateral and foreseeable but unavoidable destruction of noncombatants in the course of attacking military objectives."[195]

The basic principle that applies to military necessity as to all justifications in Ramsey's ethics, is that it can never serve as a moral reason to do evil on the premise that good will come of the act. To do evil directly by the intentional killing of noncombatants can never be morally justified on the basis of military or any other claim of necessity. Such an act is inherently wrong by virtue of the nature of the act itself. On the other hand, indirectly and unavoidable caused noncombatant deaths may be justified on the basis of being a lesser among manifestly greater evils. In fact failing to act and by doing so allowing a greater evil to occur is

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[195] Ibid., pg 429

morally wrong. The ends of any military action must justify the means used, but they cannot justify any and all means. The principle of discrimination is what ultimately determines the means which cannot be justified by any ends. In either case, what Ramsey continually focuses on is not the justifying end (military necessity) but the objective means of the action itself: will it violate the immunity from direct attack of noncombatants?[196]

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196 Ibid., pgs 141-147, 428-431

VI. CONCLUSION

In establishing a conceptual framework for determining the universally binding moral validity of the principle of discrimination, Brian Johnstone has suggested that in order for this or any other principle seeking to meet the concrete norms specified by the moral/theological prohibitions against the killing of the innocent, they must be able to pass certain tests of morally relevant effectiveness. Johnstone identifies seven of these tests: specificity, justification, feasibility, practicability, intentionality, effectiveness, and viability.[197] Johnstone's criteria will be used here to evaluate and compare both O'Brien's and Ramsey's positions on noncombatant immunity.

1. WILLIAM O'BRIEN AND THE TYRANNY OF NECESSITY

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[197] Brian Johnstone, "Noncombatant Immunity and the Prohibition of the Killing of the Innocent", in C.J. Reid, ed., Peace in a Nuclear Age, Washington D.C.: Catholic University of America Press, 1986, pgs 308-310: 1. Specification: Does it specify adequately who ought to be protected? 2. Justification: Can the limit it sets be supported by adequate reasons? 3. Practicability: Can it be followed in the real situation of war and especially nuclear war? 4. Feasibility: Can the norm generate sufficient acceptance on a broad range so as to enable it to become an effective rather than merely a theoretical limit? 5. Intentionality: Does the specific norm adequately guide intention into concrete proposals that respect the innocent, or does it, when taken up to guide specific proposals, leave room for a direct willingness to kill the innocent? 6. Effectiveness: Does the norm itself and the theory of exceptions that goes with it adequately protect the innocent from direct attack, and also from undue so called 'indirect attack?' 7: Viability: "the logic of intentionality seems to drive us in the direction of an absolutist position, either an absolute rejection of all killing, or the rejection of all killing in the strict sense, i.e., all direct killing."

O'Brien's view of relative discrimination is problematic because it fails virtually all of Johnstone's recommended tests. In the first place the concept of a flexible interpretation of noncombatant immunity that O'Brien's principle of relative discrimination suggests fails the test of specificity. In O'Brien's formulation, those defined as noncombatants in any given situation would be subject to change depending on the determination of legitimate military necessity. As a class, noncombatants would have no protection of immunity that was based solely on their being noncombatants, but only on their location relative to a potential military objective. Moreover, as the military utility of a potential objective changed with the vagaries of war, so would the noncombatant status of those located near the potential objective. In effect, his principle of relative discrimination is a principle of relative noncombatancy. One is only a noncombatant so long as one's current location at any given moment does not conflict with the ever changing requirements of military necessity, legitimate or otherwise.

O'Brien's formulation also fails the test of intentionality. Far from guiding the intentions of belligerents into actions that will respect the rights of the innocent, his rejection of the principle of double effect, and his view that noncombatant immunity is only a relative principle leads to the direct intentional killing of the innocent. In point of fact, he states this explicitly:

"But if the principle of discrimination is viewed as a

> relative principle... it seems possible to employ double effect explanations for actions wherein the major intention is to effect counterforce injury on military objectives while acknowledging an inescapable intention of injuring countervalue targets and thereby predictably violating the principle of discrimination to some extent."[198]

Regardless of how the double effect principle is utilized in this theory, an "inescapable intention of injuring countervalue targets" amounts to the direct intentional killing of noncombatants.

The test of effectiveness is also problematic for O'Brien's theory for the same reasons that it fails the test of intentionality: the concept of relative discrimination and the rejection of double effect. Far from protecting the innocent from direct attack and undue indirect attack, his view eliminates the distinction between the two entirely. In the event that legitimate military necessity requires it, noncombatants can be directly killed in O'Brien's formulation. While the law of war recognizes the rights of noncombatants it also allows those rights to be violated on the basis of the principle of double effect. O'Brien's definition of legitimate military necessity in effect recognizes that principle even though he considers it to be of no real benefit or value in limiting the killing of noncombatants. In essence, as long as the deaths of noncombatants can be shown to be proportional to the militarily necessary utility of the objective, they are permissible whether directly or indirectly intended. "Destruction of a critical military target, e.g. a nuclear missile site, justifies a proportionate

[198] O'Brien, The Conduct of Just and Limited War, pg 47

destruction of noncombatant and civilian targets within or adjacent to the military target."[199]

Johnstone himself critiques O'Brien's position of relative discrimination on the basis of practicability: can it be followed in the real situation of war and especially nuclear war? In Johnson's view "a norm rendered flexible for the sake of practicability may end up being so vague as to be quite impractical."[200] The potential for this kind of "vagueness" in O'Brien's formulation is especially strong given that the determining factor in whether or not noncombatant immunity will be recognized in any given situation is not the principle of discrimination, but the principle of proportionality as applied to military necessity.

Closely associated with practicability are the tests of viability and feasibility: Is such a formulation a viable means of preventing the death of the innocent? Can it provide an effective limit rather than just a theoretical one? In the safe surroundings of academia his position may appear legitimate, but in the actual practice of warfare where life and death decisions often have to be made with minimal time for reflection, with fragmentary information, under great stress, and in the midst of the "fog of battle," O'Brien's concept is highly unrealistic because it requires a definition of noncombatancy that is never fixed but will always be dependant upon calculations of necessity and proportionality, calculations which a commander simply may not have the time to work through in the heat of battle. This raises serious doubts as to its viability and

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[199] O'Brien, "Just War Doctrine in Nuclear Context", pg 212

[200] Johnstone, pg 315

feasibility in protecting the innocent.

Finally, Johnstone suggests that the most significant problem for O'Brien's theory lies in the test of its justification: can the limits it sets be adequately justified? Can it overcome the presumption against killing the innocent? Johnstone rightly observes that any limits in O'Brien's formulation must be determined by performing the "balancing" of noncombatant immunity against military necessity and the criteria that O'Brien has chosen to determine that balance, since he has rejected the double effect principle, is the principle of proportionality. The problem with proportionality as a governing principle for determining the legitimacy of necessary means is that the greater the value of the ends sought, the greater the tendency to allow higher losses proportionate to that end. O'Brien's theory in effect sets the stage for the functional denial of the fundamental moral tenet that a just end does not justify the use of evil means.

> "This is a notoriously difficult notion to apply, above all because the more weight that is attached to the end, the greater extension allowed in the losses proportionate to this end. Without an independent limit, such calculation of proportionate balance can allow for indefinitely escalated "permissible" loss of life. Furthermore, O'Brien construes proportionality in terms of military necessity. This seems to collapse the moral relationship of means to ends into a purely technical relationship of means to ends. This confuses distinct levels of relationality. This proposal falls short on the ground of a moral justification of the limits it proposes and allows."[201]

[201] Ibid., pg 316

2. PAUL RAMSEY AND THE UTOPIA OF ABSOLUTE IMMUNITY

When analyzed according to Johnstone's framework, Ramsey's view of the absolute nature of noncombatant immunity also reveals some significant problems in its ability to serve as an effective moral norm in protecting the direct killing of the innocent in war. Johnstone suggests that Ramsey mistakenly uses the terms "innocent" and "noncombatant" interchangeable, and that this fails the test of specificity, since the two are not necessarily the same.[202] Some individuals within a civilian context, for example, may indeed be noncombatants in the international law sense of the term, and yet not be innocents in a moral sense.

Unfortunately, Johnstone gives no examples of how he believes Ramsey does this which weakens his argument. Moreover, it is not clear that Johnstone is using the term "innocent" in the same way that Ramsey does. Ramsey clearly equates the innocent with non-participation in hostilities[203], whereas Johnstone apparently is using the term in its sense of subjective, moral culpability. Understood in the sense of non-involvement with hostilities, "innocent" does not conflict with "noncombatant" as a category and the two terms can used interchangeably.

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202 Ibid., pg 307; Johnstone argues that the categories of the innocent and the noncombatant reflect the different sources of the modern just war theory the former coming from the moral-theological and the latter from the legal tradition. Johnstone's point is that noncombatant immunity, as understood in modern international law, may not have the same moral normative force as that of the innocent within the just war tradition and so may not be as effective as a moral constraint upon the actions of belligerents.

203 Ramsey, War and the Christian Conscience, pg 144

While the issue of specification is one which Ramsey himself did not address directly, the issue can be considered from a similar argument that he offers to the charge that modern industrial society makes it impossible to distinguish between combatant and noncombatant because all support the effort of total war. Ramsey's response has been noted above in his use of John Ford's arguments on this problem: it is not necessary to know specifically who is a noncombatant only that there are noncombatants and where they are in order to justify a policy of counterforce as opposed to countervalue warfare. One could argue that the same principle applies to the distinction between the innocent and the guilty. One only need argue that the presence of children, for example, adequately satisfies the criteria that there are some "innocent" parties deserving of immunity which should obviate the possibility of direct attack on noncombatants as a class.

Secondly, Ramsey's position is problematic from the standpoint of justification and feasibility because of the explicitly religious character of its regulative principle of Christian love.[204] Because Ramsey derives his legitimizing force for the principle of discrimination from his interpretation of Augustine and the agape principle, he moves outside of the traditional natural law context of

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[204] William O'Brien has pointed out this problem in Ramsey as well: "The principle of discrimination as interpreted by Ramsey rests on moral grounds that, while overwhelmingly clear and sufficient to him, are not convincing to me and many others who write in the broad just war tradition.", see: "Morality and War: the Contribution of Paul Ramsey" in, James T, Johnson and David Smith, eds., Love and Society: Essays in the Ethics of Paul Ramsey, Missoula, Montana: American Academy of Religion Scholars Press, 1974, pg 174

the classic just war theory which derived noncombatant immunity from primarily secular concepts of culturally sanctioned norms of chivalry and which modern international law derives from secular principles of humanity. This raises the question of how well his principle of discrimination will be accepted by those who do not share his theologically based moral views. To argue that noncombatants should be immune from attack on the basis of Christian love as opposed to principles of common humanity makes Ramsey's position limited in its applicability. If the justification for the principle is not universally convincing to national leaders, policy makers, and military planners then its utility in the wider public debate is questionable and this raises the issue of its feasibility.

This criticism, however, does not detract from the consistency of Ramsey's position within a Christian ethical framework. It can be argued that setting forth the ethical implications of the Christian gospel is one of the fundamental responsibilities of the Church as it occupies its place in the public arena and speaks to the issues of its culture and society. The fact that Ramsey rejects natural law categories as the means to do that does not mean that his position has any less applicability to those outside of his religious convictions. It only means that he must be more self consciously reliant upon the effects of "common grace" as opposed to autonomous human reason to translate his position into the universally recognized moral precepts that will make his position

more acceptable.

In fact, Ramsey's position is far more likely to receive universal acceptance than traditional just war justifications of noncombatant immunity which, as discussed above, were not based on universal moral principles, but rather on the secular cultural and social practices of medieval western European society. One could argue that such time and culture bound foundations can hardly serve to legitimate a standard that presumes to have universal application. If anything, the justification to act in a manner that shows love to the neighbor as his right by virtue of being created in the image of God with dignity and value has far greater moral resonance with the principle of humanity which underlies the modern international law principle of discrimination than the principle of chivalric condescension which grants immunity to the innocent only as the benevolent gift of the warrior superior to his civilian inferior.

Associated with the tests of intentionality and effectiveness there is the problem of Ramsey's use of the principle of double effect to allow exceptions to the principle of noncombatant immunity. Although the issue of nuclear war and deterrence has been outside the scope of this study, it is well known that Ramsey at one time used the principle of double effect to justify a policy of nuclear deterrence based on the prospect of "unintended" collateral damage from direct counterforce targeting of nuclear weapons.[205] The problem that this posed for double effect was how such

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[205] Ramsey, The Just War, pgs 281-284, 314-366; War and the Christian Conscience, Ch 8.

collateral damage could be considered truly incidental and unintended when the very effectiveness of the deterrence obtained was dependant upon these unintended secondary effects.[206] Other critics argued that this use of double effect would seem to make such wide exceptions to the principle of noncombatancy, that it undermined the very principle itself and failed to adequately protect the innocent from undue indirect attack.[207] This criticism of Ramsey's position, however, does not obviate the relevance of his principle of discrimination as applied to conventional warfare. With the end of the cold war and with the spectre of deterrence and universal nuclear holocaust fading from the political horizon the principle of double effect has renewed importance in its application to noncombatant immunity.

Finally, it has been argued that Ramsey's view of an absolute principle of discrimination fails the test of practicability because it simply is not possible to observe the absolute immunity of noncombatants given the practical realities of modern warfare, even at the sub-nuclear level. It is suggested that the high lethality of modern conventional warfare and especially the essentially indiscriminate character of insurgent/counterinsurgency warfare both strain the limits of a plausible defense of the absolute immunity of noncombatants. Critics argue that modern conventional warfare inevitably involves attacking population centers in order to destroy enemy industrial warfighting capabilities. Modern conventional weapons are so highly lethal that even when they are

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206 Walzer, pg 280

207 Johnstone, pgs 318-319

used in a strictly counterforce mode the effects of their collateral damage upon civilians make discrimination impossible. A 2000 pound bomb, the type which was used against the Amariya bomb shelter during the Gulf War, for example, creates a blast crater 50 feet wide and 36 feet deep and creates a shower of shrapnel within a 1200 foot radius of its impact point.[208] Weapons such as these, even when they engage their intended targets, can create secondary effects such as fire and explosions which create additional casualties and destruction beyond the target. When they miss their military targets due to technical malfunctions or targeting errors and hit civilian facilities directly their effects can be devastating. In insurgent and counterinsurgency warfare where insurgent forces may directly target noncombatants or where they try to precipitate counterinsurgent attacks that will cause noncombatant casualties, as was the practice of communist forces in Vietnam, the difficulty in distinguishing and isolating insurgent forces from noncombatants can be almost impossible and civilian casualties inevitable.

William O'Brien further criticizes Ramsey's position on the grounds that it basically makes the meaningful exercise of national self-defense, deterrence, and the right of legitimate revolution all functionally impossible, thus denying groups these fundamental

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[208] Stockholm International Peace Research Institute, Antipersonnel Weapons, London: Taylor and Francis, 1978, pg 165, cited in Middle East Watch, pg 122. It should be noted, however, that in the Amariya incident the civilian deaths which occurred were not due to collateral damage to adjacent civilian structures, but due to the fact that civilians were using a bomb shelter which had been identified by coalition intelligence as a legitimate military target. See: Middle East Watch pgs 134-137

moral rights.[209] Both of these arguments, however, ignore the legitimate use of the principle of double effect. As was seen above, O'Brien rejects its validity outright. The argument that modern conventional warfare cannot be conducted in a discriminate manner also fails to take into account the current state of weapons technology which can be used in a more discriminating manner and which thus contributes to the legitimacy of using double effect as a justifying principle.

C. DISCRIMINATION AND NECESSITY: ETHICAL PRINCIPLES IN DIALOGUE

The basic question which concerned us as this study was undertaken was the relationship between the principle of discrimination of modern just war theory and the principle of military necessity as understood in international law and military theory and the ethical tension which exists between these two principles in the actual conduct of war. Key to an understanding of this relationship is a determination of whether the principle of discrimination is seen as a relative principle which may be overridden by military necessity or as an absolute moral principle which may never be legitimately violated. William O'Brien and Paul Ramsey provide diametrically opposed answers to this question in their respective formulations of relative discrimination plus proportionality and absolute immunity. Is a synthesis of these two

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209 O'Brien, "Morality and War", pg 174

positions possible within a Christian ethical framework?

In the nature of the case it would appear not. In part this is a reflection of the nature of the just war ethic itself as a moral framework within which to conduct ethical analysis of the permissibility and limitation of war. While the just war ethic provides the moral parameters within which theorists, statesmen, military strategists, and concerned citizens can debate the fundamental issues involved with decisions about initiating war and how to conduct it once begun, it is only a framework which provides a common language and frame of reference for that debate. Much of what will be derived from the ethical analysis conducted within this framework will be a reflection of the presuppositions of the ethical commitments already made in coming to the just war theory. The theorist who comes to the tradition on the basis of a consequentialist ethic will tend to approach discrimination as a relative principle and will see its subordination to questions of military necessity as permissible on the basis of some form of utilitarian cost-benefit analysis of the greatest good by which the end will justify the means. Likewise, the theorist who approaches the tradition from a deontological perspective will find in the principle of discrimination the locus for a very powerful moral absolute that by definition is incapable of being abrogated on any moral basis and by which some means can never be justified no matter how just the end.

In fact, this conflict of ethical systems is built into the very structure of the jus in bello itself. The principle of discrimination

is essentially framed as a moral absolute: noncombatants may not be directly killed. It thus reflects its deontological foundation whether one regards the basis for the principle as being religio-theological (Christian agape) or humanistic-philosophical (principles of humanity.) The jus in bello principle of proportionality, on the other hand is essentially framed on the basis of consequentialist ethics: the evil done must not outweigh the good obtained, but must be proportionate to it. The positions O'Brien and Ramsey take, therefore, are a reflection of the fundamental ethical tension within the jus in bello itself as their own ethical presuppositions are brought to the moral framework of the just war theory.

As a deontological absolutist working out of the Christian command to love the neighbor, Ramsey finds his foundation for the jus in bello in the principle of discrimination seen as an inviolable moral principle, which military necessity may never legitimately set aside. Noncombatants may never be directly attacked no matter how militarily necessary the situation might be. O'Brien, as a consequentialist, finds his moral center of gravity in the principle of proportionality which must act to balance the determinations of military necessity as much as possible. Noncombatants may be directly attacked if military necessity dictates, but only to the extent which is proportionate to the good obtained by the accomplishment of the legitimate military objective. Taken as statements of two fundamentally different ethical systems, these

positions appear to be irreconcilable.

Does this mean that the critics who argue that the jus in bello principle of discrimination is indeed dead are correct and that modern just war theory has nothing to contribute to the limitation of warfare at the end of the century of "total war"? I would suggest not, and that far from being a dead issue as O'Brien and other critics have suggested, the principle is more active today than at any previous time in this century, at least within the thinking of American military strategists. As was suggested in the case studies examined above, there has been a fundamental change in the attitude towards noncombatant immunity within U.S. political and military leadership between World War II and the Gulf War. In spite of the problems of indirect collateral deaths due to infrastructural degradation, the Gulf War showed a clear change both in policy and technological capabilities towards noncombatants that was far more restrictive than in World War II or Vietnam. Greater public sensitivity to the issue of noncombatant deaths in warfare, due to some extent to television coverage of war, has elevated the effectiveness of the principle of discrimination in shaping the ethical consciousness of American society. On this basis Ramsey's contention of thirty years ago, that the problem with just war theory is not that it is ineffective in limiting conduct in warfare, but rather that people simply have not been applying it to their moral thinking, would appear to be correct.

Given that noncombatant immunity is still a relevant concept for the conduct of modern war, and given the apparent impossibility of

an ethical synthesis between the absolute and relative views, the question arises as to which of these two positions on noncombatant immunity is correct from the perspective of Christian ethics and does it have the potential to stand up to the utilitarian demands of military necessity?

In grappling with the moral dilemmas posed for the principle of discrimination by the exigencies of modern conventional and nuclear warfare and deterrence, William O'Brien has tried to offer a solution to the problem of the violation of noncombatant immunity in war. His formulation of a relative principle of discrimination, however, fails to resolve many of the moral problems posed by such violations. Additionally, by making the observation of noncombatant immunity dependant upon the proportionality of military utility determined by military necessity, he in effect overthrows the principle of discrimination entirely. When evaluated within a conceptual framework for determining the morally effective relevance of his principle, relative discrimination fails as an effective measure for the protection of the innocent against the excesses of modern war. For all of these reasons, the principle of relative discrimination must be considered a step backward in efforts to make the jus in bello of the just war tradition a more effective source of moral reflection upon the restraint of war.

Because of the inherent problems with O'Brien's view, the best hope for a working principle of discrimination appears to be Ramsey's position. It would seem then that the best way to addresses the ethical tension between noncombatant immunity and

military necessity is in some way to modify how both of these principles are applied without taking away from either the moral absolutism of the former or the military utility if the latter. One possible way to do this is to reevaluate the way that double effect is used in the principle of discrimination and to reconsider the very nature of military necessity as a nonmoral principle of utility.

While Ramsey's view is not without its problems, it goes much further in protecting the moral principle of noncombatant immunity from direct attack. The most serious weakness with his position is the charge that his use of the principle of double effect allows for such vast exceptions to the principle of immunity that it tends to undermine the validity of the principle itself. While this charge must be contextualized within the Cold War situation which Ramsey himself was addressing in his writings, the moral quagmire of nuclear war and deterrence, it is still relevant to the problem of double effect within conventional warfare. At what point in a conflict can it still honestly be said that the foreseen deaths of noncombatants are unintended? This, after all, was one of the criticisms of the Gulf War bombing of the Iraqi power grid system.

Some just war theorists like Michael Waltzer have argued that the notion of double effect can be strengthen with an additional second intention by which the attacker takes additional risk to himself as a means of indicating that his intention is indeed directed at the military target rather than at noncombatants. The third criteria of the modern principle of double effect, which states

that the actor's intention is good and that the evil effect is not one of his ends nor a means to his ends, would then be modified:

> "The intention of the actor is good, that is, he aims narrowly at the acceptable effect; the evil effect is not one of his ends, nor is it a means to his ends, and aware of the evil involved, he seeks to minimize it, accepting costs to himself."[210]

This "double intention", then, reflects not merely the determination not to attack noncombatants directly , but to make the positive commitment to save civilian lives by increasing the risk to combatant's lives. While Walzer does not indicate the limits of risk a combatant should take to protect noncombatant lives, the obvious limit from a military perspective will be that which does not unduly compromise the accomplishment of the mission. In fact there is good evidence of exactly this principle at work during the Gulf War when the air war planners determined not to strike at the anti-aircraft defenses over Baghdad in order to avoid civilian casualties and instead to face the additional risk of pilots being shot down.

Ultimately, the degree to which the principle of double effect can be stretched to justify the unintended deaths of noncombatants will always depend on the extent allowed by the determination of proportionality which is built into the principle itself. However, the extent to which noncombatant deaths are truly unintended would appear to be enhanced by the determination to take additional risk to

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210 Walzer, pg 155

avoid such deaths. An enhanced principle of double effect, therefore, may help to preserve the validity of the absolute immunity of noncombatants from direct attack.

In considering how best to understand military necessity in terms of moral categories, it is important to keep in mind that in principle, there should be no ethical tension at all between noncombatant immunity and military necessity. Current U.S. military doctrine, as has been seen above, does not view the law of war as violable on the grounds of military necessity, because military necessity has already been taken into consideration in the formulation of the laws of war. Noncombatant immunity is an acknowledged principle of international law that is stipulated in military manuals. Historically, however, as we saw in our case study military necessity can in fact come to override jus in bello concerns.

Moreover, the fact that a practice is considered to be legally permissible under international law does not necessarily mean that it is morally licit when considered within the ethical framework of the jus in bello. An act of war may be totally legal and yet morally questionable. The example of the Gulf War highlights this point. Because the U.S. is not a signatory to Protocol I of the 1949 Geneva Conventions, the destruction of the Iraqi power grid system could be said to be a legitimate act of military necessity that was not violative of international law. This does not, however, automatically legitimize the action as morally permissible in terms

of the jus in bello principle of discrimination. Ethical tension in war is real despite the legal bounds sometimes placed on military necessity by international law.

The ethical conflict that often occurs for the military strategist or commander faced with the dilemma of accomplishing a mission under constrained conditions where the violation of noncombatant immunity seems impossible to avoid, as occurred so frequently in the counterinsurgency warfare of Vietnam, presents the greatest moral challenge. An enhanced principle of double effect may help balance the moral equation by making the principle of discrimination more capable of standing up to utilitarian challenges. The commander, for instance, who accepts additional risk in order to "double" the intention of his action which results in forseen but unintended collateral deaths may have a better case for the moral argument that the military necessity of his situation was truly a matter of necessity. On the other hand, such moral dilemmas lead many military personnel to despair of the possibility of a genuine reconciliation of these principles in the actual conduct of war. The niceties of noncombatant immunity may seem realistic in a peacetime situation, but the realities of war, they argue, must be dealt with on the basis of pure military realism which obviates any meaningful place for ethical considerations. Such a view, in some respects evocative of the discredited Kriegsraison version of military necessity, fails to properly understand the fundamentally moral nature of military necessity itself as a principle.

Kenneth Wenker, a former professor at the U.S. Airforce Academy,

has pointed out that the existence within the military of a mindset, ("an unofficial, nonregulated conceptual practice"), that thinks of military necessity as a strictly "practical, unavoidable, nonmoral need which is opposed to moral concerns which restrain us in the pursuit of our mission" is very real and far reaching. This mindset has the tendency to add to the ethical tension between military necessity and moral concerns in general. It does this by setting the nonmoral over against the moral and arguing that practical matters are more important than moral issues. Wenker points out that this is a false dichotomy and that the tension is really between two conflicting moral needs. This is because military necessity itself is a moral principle. Wenker's argument hinges on his assumption that the decision to go to war is itself a moral decision, that there is a "moral goal, a moral intention, a moral end in mind."[211]

> "If the war is to attain such an important moral end, then it becomes morally important as a means to that end that we in fact win the war - not necessarily in the sense of militarily crushing the enemy, but rather in the sense of achieving the moral end for which the war is fought. 'Military necessity,' simply put, is that which is necessary or useful for attaining the moral end for which the war is fought. And because it is the means to a moral end, it becomes morally important. This does not mean that it automatically overrides other, conflicting moral concerns. After all, the fact that an end is morally important does not justify any means that might be

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211 While Colonel Wenker does not address this point in strict just war terminology, it is not unlikely that this is the context of his thought given his position at the Academy as Deputy Head of the Department of Philosophy and Fine Arts. His point, then, is simply a statement of the relationship between the jus ad bellum and the jus in bello.

> useful or necessary to attain it. Tough moral decisions are still necessary. In fact, our own regulations give only the general principles, putting the responsibility for moral decision making in specific situations squarely on the commander's shoulders. To summarize my point: our institutional practice of looking at 'military necessity' as a nonmoral element is wrong. Military necessity is in fact a legitimate moral concern."[212]

Understanding the moral character of military necessity means that the ethical tension between noncombatant immunity and military necessity needs to be seen as a tension between two conflicting moral needs. As Wenker points out the fact that military necessity is a moral means to accomplishing a moral end, does not mean that it "automatically overrides other, conflicting moral concerns", such as noncombatant immunity. Rather it must be seen as one factor which a commander must take into account as he balances all of the moral elements involved in his ethical decision making process. This is a profoundly different view from that which places ultimate and unassailable authority in military necessity to the exclusion of all other relevant categories of conceptual and ethical analysis. While this may not eliminate the tension entirely, it does serve to remove the conflict from a clash between morality and realism to one which is more practically addressed by moral discourse.

Viewing military necessity as a moral principle places it in a

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212 Colonel Kenneth Wenker, USAF, "Military Necessity and Morality", in, Military Ethics: Reflections on Principles, Washington, D.C.: National Defense University Press, 1987, pg 179

position of constructive dialogue with noncombatant immunity and other ethical principles by means of which decisions can be made that are a reflection of moral reasoning rather than simple utility. While it is beyond the scope of this work to pursue the way in which these conflicting ethical norms ultimately can be resolved in military decision making, the concept of constructive dialogue between competing ethical norms does point to one possible avenue of approach deserving of further study. According to the law of war, there should be no legal conflict between military necessity and noncombatant immunity. By approaching military necessity as an ethical principle rather than as a strictly practical and prudential one, it may be possible to balance the two so that they do not conflict morally either.

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